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Supreme Court, U.S.
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No. 96-1570

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NYNEX CORPORATION, *et al.*,
Petitioners,

v.

DISCON, INCORPORATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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JOINT APPENDIX

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NOTICE

The following opinions and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

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Decision and Order of the District Court, dated June 7, 1995	21a
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Relevant Docket Entries in the District Court

Date	Docket Number	Docket Entry
5/25/90	1	Filed Complaint with jury trial demand
8/29/90	5	Filed defts' Notice of Motion to Dismiss Complaint and to Impose Sanctions (no ret)
6/24/92	19	ORDER set filing of Amended Complaint Deadline to 7/31/92; . . .; if amd complaint not filed by 7/31/92, dismissal with prejudice shall result; granting, w/o prejudice, defts' motion to dismiss; denying, w/o prejudice, defts' motion for sanctions . . .
7/31/92	20	AMENDED COMPLAINT by Discon, Inc., . . . amending complaint with jury trial demand . . .
9/14/92	23	MOTION . . . to Dismiss amended complaint & for Sanctions . . .
6/7/95	70	ORDER granting . . . motion to Dismiss amended complaint . . .
6/14/95	71	JUDGMENT in favor of defendants based on decision by court . . .
7/5/95	73	NOTICE OF APPEAL by Discon, Inc. . . .

Relevant Docket Entries in the Court of Appeals

Date	Docket Entry
11/13/95	Appellant Discon Incorporated brief FILED . . .
12/11/95	Appellees Bernard O'Reilly, Robert J. Eckenrode, New York Telephone, Nynex Material, Appellee Nynex Corporation brief filed . . .
12/26/95	Appellant Discon Incorporated reply brief filed . . .
3/27/96	Case heard before NEWMAN CH.J., OAKES, PARKER, C.JJ. . . .
8/26/96	Judgment of the district court is AFFIRMED, in part, REVERSED, in part, and remanded for further proceedings by published signed opinion filed. (JON) . . .
8/26/96	Judgment filed . . .
9/9/96	Appellees Bernard O'Reilly, Robert J. Eckenrode, New York Telephone, Nynex Material, Nynex Corporation Petition for rehearing, petition for rehearing in banc . . . filed . . .
1/7/97	Order FILED . . . DENYING petition for REHEARING . . . by Appellee Bernard O'Reilly, Robert J. Eckenrode, New York Telephone, Nynex Material, Nynex Corporation, . . ., DENYING petition . . . for rehearing in banc by Appellee Bernard O'Reilly, Robert J. Eckenrode, New York Telephone, Nynex Material, Nynex Corporation . . .

Complaint, dated March 25, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

CIV-90-0546A

DISCON, INCORPORATED,
Plaintiff
v.
NYNEX CORPORATION,
NYNEX MATERIEL ENTERPRISES,
NEW YORK TELEPHONE,
ROBERT J. ECKENRODE, BERNARD O'REILLY,
Defendants

JURY TRIAL DEMANDED

COMPLAINT

Plaintiff, Discon, Incorporated ("Discon"), alleges as follows:

NATURE OF THIS ACTION

1. This action responds to a pattern of bidrigging and other discriminatory procurement practices by which NYNEX caused its telephone subsidiaries to divert regulated funds to an unregulated affiliate, NYNEX Material Enterprises ("MECo"). NYNEX forced the telephone subsidiaries to buy from MECo, even when MECo's prices exceeded those of unaffiliated suppliers. MECo procured goods and services from these suppliers and then applied

markups as high as 1004%. MECo threatened to retaliate, and did retaliate, against suppliers who disclosed these markups to the regulated companies and offered to compete with MECo. These anticompetitive activities injured Discon, a low-cost supplier of network services.

2. Discon also alleges that MECo's practices formed part of a larger pattern of fraudulent and extortionate activity, in violation of federal racketeering law. Finally, Discon seeks relief under the General Business Law, the Public Service Law, and the common law of New York.

3. Because Robert J. Eckenrode oversaw the creation of MECo as a profit-making enterprise and participated personally in unlawful diversification, the system of diverting regulated funds to subsidize unregulated NYNEX affiliates is known as the "Eckenrode Plan." The Eckenrode Plan has artificially inflated the stated value of NYNEX's regulated ratebase by as much as $800 million.

4. The Federal Communications Commission ("FCC") has found that these activities violate its rules and has ordered NYNEX to show cause why it should not impose the largest fine in its history. In November 1987, the New York Public Service Commission ("PSC") issued a staff review indicating that "outside vendors cannot realistically compete with MECo." In May 1990, the PSC released a detailed audit report that criticized MECo's "inconsistent and unfair" treatment of suppliers of network services. The United States Department of Justice ("Justice") has informed the press that it expects to indict NYNEX in connection with various activities described herein.

JURISDICTION

5. This case arises under the federal antitrust laws, Title 9 of the Organized Crime Control Act ("RICO"), Article 22 and 22-A of the New York General Business Law ("Donnelly Act"), the New York Public Service Law, and the common law.

6. 15 U.S.C. 15 (Section 4 of the Clayton Act) confers jurisdiction over Counts One through Three.

7. 18 U.S.C. 1964 confers jurisdiction over Counts Four through Six.

8. This Court has pendant jurisdiction over Counts Seven through Thirteen.

VENUE

9. Each of the defendants does business in the Western District of New York.

10. 15 U.S.C. 22, 18 U.S.C. 1965, and 28 U.S.C. 1391 provide venue in the Western District of New York.

PARTIES

11. Plaintiff Discon is a corporation organized under the laws of the State of New York. Discon's primary business is the provision of "network services," which includes the removal, repair and installation of telephone central offices and other equipment used by telephone carriers. At times relevant to this complaint, Discon was a customer of New York Telephone ("NYT"), from which Discon obtained telephone services under tariff.

12. Defendant NYNEX Corporation ("NYNEX Corp.") is a holding company incorporated under the laws of Delaware. Its principal place of business is New York City. NYNEX's principal business is the provision of exchange service and exchange access, which it conducts through regulated subsidiaries NYT and New England Telephone & Telegraph ("NET").

13. Defendant MECo is incorporated under the laws of Delaware. NYNEX created MECo as a separate, profit-making venture responsible to the parent holding company. MECo's primary business function is procuring goods and services for NYT and NET, and for NYNEX Service Company ("NSC"), a subsidiary of the regulated telephone companies.

14. Defendant NYT is a New York corporation, which provides exchange telecommunications and exchange access in New York State and adjacent areas of Connecticut.

15. Defendant Robert J. Eckenrode is a citizen of Connecticut. As an employee of AT&T, Eckenrode served as vice president in charge of planning the structure of NYNEX, during the year prior to its divestiture. From 1984 to 1988, Eckenrode was executive vice president of NYNEX Corp. and oversaw MECo and other unregulated activities. In 1988, NYNEX Corp. named him vice chairman.

16. Defendant Bernard O'Reilly is a citizen of New Jersey. O'Reilly was a district manager of MECo who retaliated against Discon because, among other reasons, it refused to participate in attempts to defraud purchasers of scrap that MECo acquired from NYT.

17. Officers and outside counsel to NYNEX Corp., including Guy Struve, concealed information regarding the Eckenrode Plan from the board of directors. On February 15, 1990, seven of the directors claimed that they had not been involved in any way in the alleged illegalities. The board agreed to form a Special Review Committee to determine whether to commence litigation against Eckenrode and the other remaining directors.

I. BACKGROUND

18. In the face of litigation under the Sherman Act, NYNEX made specific undertakings not to discriminate against unaffiliated suppliers. Despite these commitments, NYNEX discriminated against Discon and monopolized markets for network services.

19. Until January 1, 1984, AT&T owned the Bell operating companies ("BOCs"), including NYT and NET. AT&T also owned Western Electric, now known as AT&T Technologies ("Western"), which manufactured and procured equipment for the BOCs. BOCs obtained a small

amount of equipment from unaffiliated suppliers, collectively known as the "general trade."

20. On November 20, 1974, the United States filed a civil antitrust action against defendant AT&T, which then owned NET and NYT. The action charged that AT&T (also known as the Bell System) monopolized various markets in violation of Section 2 of the Sherman Act. The principal claim was that AT&T used the BOCs' natural monopoly over exchange service to discriminate against unaffiliated suppliers and thereby extend its monopoly power into potentially competitive markets, including the markets for network equipment and network services.

21. On September 11, 1981, the United States District Court for the District of Columbia found that "the Bell System has violated the antitrust laws in a number of ways over a lengthy period of time." *United States v. AT&T*, 524 F. Supp. 1336, 1381 (D.D.C. 1981). Specifically, the Court concluded that "procurement decisions within the Bell System tend to create a predisposition within [BOC] managers in favor of Western profits and against the general trade competition." *id.*, at 1373. On August 11, 1982, this District Court found that "there was proof that AT&T used its control over the local Operating Companies to force them to buy products from Western Electric even though other equipment manufacturers produced better products or products of identical quality at lower prices." 552 F. Supp. 131, 163 (D.D.C. 1982). On August 24, 1982, AT&T entered a consent decree ("consent decree") to settle this litigation.

22. The consent decree (Section I) required that AT&T divest the BOCs.

23. In 1983, AT&T caused NYNEX Corp. and six other regional holding companies to incorporate. On January 1, 1984, as a result of the consent decree, AT&T transferred two telephone companies (NYT and NET) to NYNEX Corp.

24. The consent decree imposed obligations on NYNEX and other divested BOCs. The consent decree required the BOCs to provide equal access to interexchange carriers, which resulted in a large number of removals and installations of exchange central offices. It prohibited the BOCs from discriminating between AT&T and others in the procurement of products and services (Section II.B.1), and required them to submit procurement procedures to Justice (Section II.C). The Court of Appeals has held that Section II.B prohibits a BOC from discriminating in favor of its own affiliates. *United States v. Western Electric*, 846 F.2d 1422, 1428 (D.C. Cir.), *cert denied*, 109 S.Ct. 306 (1988).

25. The consent decree (Section III) requires each officer, employee, and agent of NYNEX and its affiliates to cooperate in ensuring that its provisions are carried out.

26. AT&T created MECo prior to divestiture and caused NYT and MECo to enter into an agreement ("MECo Supply Contract") that purported to make "available to [NYT] a procurement entity which is established, organized, staffed, and equipped to purchase products and . . . services . . . so as to achieve economies and other increased efficiencies." The agreement required MECo to maintain reasonable prices and to include them "insofar as practicable [in] published price lists." AT&T caused NYT and Western to transfer personnel to MECo. In reality, however, MECo lacked the staffing and expertise to conduct effective procurement on a competitive and independent basis. Even after divestiture, it remained predisposed to rely on AT&T.

27. NYT failed to file a copy of the MECo Supply Contract with the PSC, as required by Section 110(3) of the Public Service Law. The PSC staff reviewed the contract in November 1987 and concluded that it was incomplete and inadequate.

28. On January 1, 1984, AT&T transferred control of MECo to NYNEX Corp. AT&T failed to comply with

Section I.B of consent decree, which required that MECo receive "sufficient facilities, personnel [and] systems . . . to perform independently of AT&T." Accordingly, NYNEX Corp.'s acquisition of MECo was unlawful and does not insulate NYNEX from liability for conspiring with its illegally acquired affiliate to restrain trade. As a direct result of the unlawful defect in the acquisition, MECo perpetuated the same noncompetitive practices that prevailed prior to divestiture. These resulted in awarding Western virtually all contracts and charging excess costs into NYT's ratebase and regulated expense accounts.

29. As found by the PSC staff, "MECo's early central office equipment removal jobs demonstrated poor service to NYT and highlighted MECo's lack of experience. . . . MECo's management actually did lead to inconsistent and unfair treatment of vendors." The PSC staff concluded that NYT could have saved at least $20 million by managing removal jobs in house.

30. On July 2, 1984, NYNEX submitted a Procurement Compliance Report to Justice. This Report made a series of representations, including that:

(a) "NYNEX's overall procurement policy [is] to seek the most technically suitable and cost effective quality products/services" and "to assure that we are evenhanded in our treatment of suppliers so that we may buy the best available products and services at the lowest overall price."

(b) NYNEX has "an Open Door Policy" with "specific policy and practice guidelines . . . designed to insure that [vendors] receive equitable and fair consideration and that procurement decisions are premised upon objective and unbiased standards, adequately supported and documented."

(c) "Although [NYT] makes its own ultimate selection or procurement decision, MECo assists [it] in identifying multiple sources of supply."

(d) "MECo has established a single point of contact to investigate and respond to supplier complaints or allega-

tions of unfair treatment, including claims relating to possible discriminatory practices by NYNEX employees."

(e) Reasons for disqualifying vendors (including vendors other than Western) are documented in a specified form.

(f) Vendors (including Western) are disqualified is they fail to respond to requests for proposals by the response date.

31. Each of these representations misstated NYNEX's actual practice. In reality:

(a) NYNEX forced NYT to procure through MECo whenever possible. This enabled MECo to charge excessive markups and to price without regard to cost. MECo's excess charges not only resulted in unregulated income to NYNEX, but they also increased the revenue requirements that NYT is authorized to recover from monopoly ratepayers.

(b) NYNEX did not make its alleged "Open Door" policy available to vendors; nor did it properly document procurement decisions.

(c) NYNEX forced NYT to buy from MECo. MECo made little effort to identify multiple sources of supply; as late as 1985, there were only two outside removal vendors other than Western. NYT created an evaluation unit to document comparisons of MECo and outside vendors; this group transcribed onto its own letterhead studies fraudulently prepared by MECo personnel.

(d) There was no publicized point of contact for vendor complaints. MECo refused even to consider complaints from Discon unless it signed a release excusing all past misconduct. In another instance, a MECo district manager told Discon that if it even told anyone in NYT about a billing dispute Discon would never get work again.

(e) Discon was disqualified from jobs without reason or documentation. MECo forced Discon to decline to respond to bids placed by NYT directly; in one case, MECo even forced Discon to sign a letter MECo had prepared.

(f) MECo was not disqualified from jobs even when it did not file a timely bid. In one case, NYT even made information on Discon's pricing available to MECo and allowed it to rebid.

II. MECo's MONOPOLIZATION OF NETWORK SERVICES

32. NYT provides exchange service and exchange access to customers in New York and Connecticut. The FCC regulates NYT's charges for exchange access, the methods of accounting and depreciation, and the manner in which NYT transacts business with affiliates. The New York PSC and the Connecticut state commission regulate exchange service in the respective states. Because of NYT's monopoly power, these regulators have authority to set maximum rates. NYT is constitutionally entitled, however, to recover all reasonable costs of its regulated businesses.

33. Despite divestiture, NYT remains the dominant exchange carrier in New York State. Except for Rochester, Jamestown and Middletown, NYT serves every town and city in the State whose population exceeds 25,000. As of December 31, 1989, NYT served 89.9 percent of all network access lines in the State. In these areas, NYT supplies more than 95 percent of exchange service and exchange access.

34. As a result, NYT is the dominant purchaser of network services in New York State. The consent decree required NYT to provide equal access to interexchange service. This has required NYT to remove substantial parts of most central offices and to install new electronic switches. NYT's network service requirements have been approximately $50 million per year since divestiture.

35. Most other BOCs rely on unaffiliated contractors for removals (or use employees whose wages are charged directly into regulated accounts). NYT performs approximately 25 percent of its removals and contracts with MECo for the remainder. The purpose of this arrangement is to allow NYT to charge excess costs into regulated accounts and to generate profits at MECo, which is not subject to regulation.

36. At times relevant to this complaint, MECo's economic interests were separate from and independent of those of NYT. Because of the unlawful manner in which AT&T transferred MECo to NYNEX, MECo continued to collude with, cooperate with and depend upon AT&T and Western. MECo was not subject to utility regulation and claimed to be free to maximize its profits. On March 16, 1990, NYNEX Corp., under pressure from regulators, transferred its ownership of MECo to NYT and NET.

37. At least until March 16, 1990, NYNEX used MECo to inflate the costs that NYT recovered under state and federal tariffs and to generate unregulated profits that MECo sent to NYNEX Corp. as dividends.

38. As found by the FCC, "MECo overcharged its regulated affiliates on sales of products and services, and the regulated telephone companies in turn, passed on excessive costs to ratepayers by improperly recording the overcharges 'above the line' as regulated costs." *New York Telephone* ("*NYT*"), FCC 90-57, para. 16.

39. As found by the FCC, "notwithstanding inconsistent statements in [materials filed with the FCC], markups had a wide and inconsistent range with no discernable relationship to costs." *NYT*, para. 18.

40. The FCC staff's limited examination of six removals found markups of up to 60 percent. In 1984, however, MECo had a policy of marking up major removals by 250 percent.

41. As found by the FCC, "NYNEX's corporate purchasing policy, which required [NYT and NET] to purchase certain product lines and services through MECo in most instances, contributed to and reinforced MECo's pricing strategy." *NYT*, para. 18.

42. As found by the FCC, "MECo's return on investment for each of the five years from 1984 through 1988 far exceeded the allowable rate of return for regulated affiliates, and grew enormously." *NYT*, para. 17. MECo's return on investment for 1988 was 81 percent.

43. The FCC determined that MECo's conduct prior to January 1, 1988 was inconsistent with its rules, 47 C.F.R. 31.01-2(c) and tentatively concluded that NYT's purchase of goods and services from MECo at inflated prices constituted an unreasonable practice in violation of Section 201(b) of the Communications Act of 1934, 47 U.S.C. 201(b).

44. The FCC found that MECo's overcharges had generated excess profits of more than $118 million. This substantially understates the true magnitude of excess costs imposed by MECo. Once MECo learned that the FCC and PSC were examining its profits, however, it diverted them to other unaffiliated subsidiaries. In 1987, for example, MECo bought personal computers from NYNEX Business Information Systems ("BISC") at a price above market. The scope of the FCC audit was extremely limited; it did not reach diverted profits or excess costs associated with MECo's inefficiency and its discrimination in favor of Western.

45. Western is a major supplier of network services in New York State. Prior to divestiture, NYT advised the PSC that there were no vendors other than Western that were qualified to handle live removals. Western performed virtually all removals and installations of NYT's exchange central offices. It continues to be the exclusive supplier of network services to AT&T Communications, which operates an interexchange network in the State.

46. MECo's profitability was substantially dependent upon its relationship with Western. Western is a major supplier of electronic switches, which have comprised a major portion of NYT's $7.5 billion construction project since divestiture. Western pays MECo a year-end rebate on these purchases, which MECo retains and does not pass along to NYT. These rebates (and the shared historical tie to AT&T), contributed to the preference which MECo consistently exercised for contracting with Western, rather than general trade suppliers.

47. NYNEX and Western combined to divide the market for network services in New York State. MECo agreed to award Western most contracts on a non-competitive basis. MECo and NYT allowed Western to write job change orders (or "JIMs") to increase payments on fixed price contracts. In return for these concessions, Western agreed to serve only as a subcontractor to MECo on most contracts, which allowed MECo to mark up Western's prices.

48. An additional reason that MECo reached this accommodation was its assumption that NYT managers preferred to deal with directly with Western. MECo's original business plan stated that "attainable sales are based on the recognition that some geographic areas [of NYT] may continue to exhibit a reluctance to switch from traditional vendors of choice [*i.e.*, Western]. Therefore, MECo projections for 1985 cover 50 percent of the potential business." By dividing the market with Western as described in paragraph 47, MECo obtained control of virtually all removal contracts.

49. Employees of NYT who concluded that there was a cost advantage to purchasing from a source other than MECo were required to submit full documentation for review by superiors. Such employees were accused of not promoting "corporate synergy." They suffered adverse personnel evaluations.

III. NYNEX's DISCRIMINATION AGAINST DISCON

50. In June 1984, Robert Faltisco formed Discon and informed Robert Zirkelbach, MECo's manager of network services, that he was willing to compete with Western on any size removal.

51. In 1984 and 1985, there were only three suppliers of network services certified by MECo: Western, Discon, and LISN. From divestiture until 1989, Western has supplied at least 75 percent of the all network service contracts not performed by NYT's internal staff.

52. Discon enjoyed substantial cost advantages over Western and was able to perform removals of any size anywhere in the State. After six months, Discon had 25 employees and budgeted hiring 50 more in the following year. Discon had a perfect safety record and no service interruptions. In its first year, Discon won every competitive contract and performed more than $1.3 million in removals. Discon's growth was limited only by NYNEX's anticompetitive conduct, which forced Discon to discontinue most of its operations and to lay off most of its employees.

53. Discon provided removal services that were equal or superior in quality to Western's. Discon developed cost-saving innovations, including outside construction elevators, rotating character stamps, portable plywood walls, and safety procedures, many of which MECo encouraged Western to adopt. In June 1984, MECo determined that Discon was "as qualified as [Western] to provide removal services."

54. Prior to divestiture, Western was almost the only vendor of network services to NYT and all other BOCs. In 1984, it lowered its prices on many contracts. MECo's markups brought the prices back to near their historic level. As such, the marked up prices did not appear out-of-line to NYT managers or to regulators. MECo had

great initial enthusiasm for Discon, because it helped to lower Western's prices and to increase the margin available for MECo's own markups.

55. However, Discon inherently threatened to expose the divergent economic interests of NYT and MECo. If Discon bid directly to NYT, NYT managers would learn its true prices; they could question the NYNEX corporate policy of allowing markups. In the event that Discon's low costs became known to regulators, they could disallow the high costs that NYT passed on to its monopoly ratepayers. These concerns led MECo to discriminate against Discon, even though its lower prices could have allowed higher markups.

56. MECo discriminated against Discon and in favor of AT&T by allowing Western access to its "725" prepaid billing system. This provided for payment one month in advance of work performed. Discon's payments, by contrast, were irregular and delayed by as much as a year after performance.

57. MECo further discriminated against Discon and in favor of AT&T by refusing to provide written contracts or authorizations for three jobs, whose value exceeded a million dollars. Because this practice violated standard procurement procedures. O'Reilly demanded that Faltisco tell NYT personnel that Discon had received countersigned copies of its offers.

59. NYNEX Corp. caused NYT to discriminate against Discon and in favor of AT&T by assigning to Western its supervisory and quality control responsibilities relating to contracts awarded to Discon.

59. MECo forced Discon to accept obligations outside its contract, to forego billing job changes and to dispose of scrap on non-economic terms. O'Reilly threatened to retaliate against Discon if it did not absorb the costs added by these changes. The purpose of these changes

was to conceal losses caused by errors and irregularities in MECo's administration of contracts. These burdens discriminated against Discon and in favor of AT&T because O'Reilly did not impose similar requirements or make similar threats against Western.

60. Western used JIMs or charged extra hours on non-competitive jobs to build up a reserve to subsidize predatory pricing on jobs that were open to competitors. In connection with the removal of a 4A switch and tandem at the central office on Franklin Street in Buffalo, Western calculated a bid price of $1.7 million. In order to undercut Discon, Western bid $998,000, which was below its actual costs.

61. On June 18, 1984, Discon submitted a bid to MECo for $574,000 for the Franklin Street removal and won the contract. Without the knowledge of Discon or of NYT managers, MECo marked this up by 45 percent to $832,300. MECo sent NYT documentation in which Western's actual bid had been covertly marked up by the same percentage.

62. On July 17, 1984, Discon performed an emergency re-use removal in Chappaqua at the request of NYT Engineering. NYT told Discon that they were unable to reach anyone at MECo in a timely manner. O'Reilly upbraided Discon for dealing directly with NYT and particularly for disclosing the price of the removal, which threatened MECo's future ability to pass on undisclosed markups.

63. In mid-August 1984, NYT asked Discon to perform an emergency cable-mining job at Franklin Street, Buffalo. Discon was unable to reach anyone at MECo to discuss the request. Discon agreed to do the job for $1,000, which was far below the rates that MECo had been charging NYT for similar work performed by Discon. O'Reilly again upbraided Discon for working directly for NYT. He stated that NYNEX policy prohibited vendors from disclosing their prices to NYT.

64. In late October 1984, a NYT engineer told Faltisco that Western was complaining that Discon was awarded Franklin Street only because MECo had not marked up the Discon price as much as the Western price. As a result, Faltisco met with John Jacoy, a NYT manager, and disclosed Discon's actual price. At this time, Jacoy learned that MECo had marked up Discon's price by 45 percent. Jacoy later found that there were markups of up to 600 percent on other Discon jobs.

65. In early November 1984, Jacoy asked Discon to perform another emergency removal. Discon agreed to do the job for $20 per hour. This was substantially below Western's rate.

66. MECo sold scrap from its central offices to various dealers, including AMAX Copper. In late September 1984, O'Reilly instructed Discon by telephone to "salt" scrap at Franklin Street by placing higher grade switches on top. Discon agreed to do so, but declined affirmatively to misrepresent the truth to AMAX. Discon refused to denying that certain scrap had already been removed. The district manager said that Discon would "pay" for its failure to do so.

67. On or about November 2, 1984, O'Reilly directed Faltisco by telephone to remove wire spring relays from scrap sold to AMAX. O'Reilly warned Faltisco that he would put Discon "out of business" if it did not comply.

68. During November 1984, NYT requested that Discon submit a bid for a removal in Williamsville. Two days before the bid was due, O'Reilly caused Zirkelbach to fly to Buffalo and to demand that Discon notify NYT that it would not bid. O'Reilly told Faltisco that unless he signed the letter delivered by Zirkelbach, MECo would put Discon "out of business." The letter stated that Discon was only "prepared to accept orders [placed through] NYNEX MECo pursuant to our existing contract agreement." Zirkelbach also delivered a contract backdated to

November 1, 1984, which allowed Discon to provide network services to NYT through MECo. Zirkelbach represented that Discon should anticipate that MECo would ask it to bid on all network service projects that MECo administered. He told Faltisco that he had better prepare for Discon to "grow like hell."

69. An NYT manager telephoned Faltisco on the due date and told him that unless Discon bid on Williamsville and agreed to work directly with NYT, he would see to it that Discon never worked for NYT in the mid-Hudson region. Subsequently, both NYT and MECo excluded Discon from all requests for proposals in the mid-Hudson region.

70. Western agreed to do the Williamsville removal for the firm price of about $20,000. Western failed to complete the removal, even after submitting additional billings (JIMs) for $40,000. NYT made these additional payments over Jacoy's objection.

71. The effort of Jacoy and his superior to regain control over network service contracting was ultimately unsuccessful. William C. Ferguson, then president of NYT and now chairman of NYNEX, ordered NYT personnel to conduct all purchasing through MECo, unless they could fully document the grounds for an "exception" and obtain high-level approval. Ferguson reaffirmed this policy in February 1986. Complete control over removals returned to MECo in the Upstate area.

72. On January 1, 1985, Discon and MECo entered a general supply contract for a term of three years.

73. In February 1985, Jacoy requested a bid for removals at Jamestown and Fredonia. On March 1, 1985, NYT accepted Discon's price quote.

74. In March 29, 1985, O'Reilly falsely told Faltisco by telephone that NYT had closed billing for Franklin Street, when in fact NYT had instructed O'Reilly to ac-

cept billing for extra work that Discon had performed. Discon did not receive any portion of more than $120,000 in invoices prior to December 1989.

75. On June 19, 1985, two employees of NYT Security visited Faltisco. They threatened to make an unfavorable report about Discon unless Faltisco made a statement that Zirkelbach had extorted money from him. Faltisco declined to make the statement because it was untrue. On July 9, MECo demanded and received Zirkelbach's resignation. In an effort to defame and discredit Discon, NYT falsely told the PSC that Discon had made Zirkelbach a loan that it did not expect to be repaid.

76. During the second half of 1985, Discon performed numerous removal jobs directly for NYT in the Upstate area.

76. During the first half of 1986, Discon performed about fifteen removals for NYT. In most of these case, Discon received payment within two months.

77. In March 1986, NYT invited Discon to bid on the removal of equipment from its Cortland central office. Discon delivered a sealed, firm price bid the day before the response date. A week later, NYT returned the bid unopened stating that NYT had decided to have MECo handle the bidding.

78. In March 1986, Discon hired Zirkelbach to help on proposed work for Rochester Telephone Company. On May 29, 1986, an employee of NYT Security asked Faltisco if he had hired Zirkelbach and then told Faltisco that he was instructed to state that Discon would not be allowed to perform removals for eighteen months to two years. The following day, the employee stated that he was writing a strong recommendation that Discon be restored to the approved vendor list. The employee also agreed to supply a written copy of NYT's procurement policies.

79. On June 10, 1986, another employee of NYT Security again told Faltisco that he would not be allowed to work for MECo or NYT for a year to eighteen months. No written reason was given. NYT personnel refused to meet with Faltisco to explain the action.

80. Since at least June 1986, the improper decertification of Discon as an approved vendor for MECo or NYT and the refusal to allow Discon to submit bids has restrained Discon from competing in markets for network services and injured it in its business.

81. On September 8, 1986, a MECo employee told Faltisco that he would not be allowed to work for MECo or NYT until he signed a release and returned evidence of the illegal markups and of incidents of discrimination in favor of Western.

82. In May 1988, after an audit by the PSC, top management directed NYT to contract directly with vendors in all removals. By this time, Discon had laid off all its employees.

83. From the middle of 1988, NYT began to use separate accounts to record its estimates of illegal overcharges by MECo. In December 1988, MECo agreed to a partial refund of $42.2 million. This amount did not include any overcharges from 1984 through 1987.

THE PATTERN OF RACKETEERING

84. At relevant times, in the Western District of New York and elsewhere, the defendants unlawfully, willfully, and knowingly engaged in a pattern of racketeering activity as defined in 18 U.S.C. 1961(1) and 1961(5). The pattern included acts of wire fraud, mail fraud, fraud in the sale of securities, obstruction of justice, and violations of the Hobbs Act and of the Travel Act. These predicate acts (and other overt acts of the conspiracy) injured Discon in its business and property. The pattern extended beyond Discon to include similar acts directed at em-

ployees, suppliers, and customers of other NYNEX affiliates.

85. It was a part of the pattern of racketeering that NYNEX defrauded NYT and NET and their ratepayers by forcing NYT and NET to purchase services and equipment from MECo and other unregulated subsidiaries at inflated prices.

86. It was a part of the pattern of racketeering that senior executives of MECo, including Lawrence Friedman, solicited and accepted gratuities from vendors and fraudulently billed expenses to MECo. Personal interest in these corrupt pactices prevented these executives from implementing accounting systems and practices that would detect and expose procurement irregularities. The atmosphere of corruption at MECo deterred its employees from reporting the larger irregularities involving Western.

87. It was a part of the pattern of racketeering that NYNEX Corp., NYT, and NET failed to disclose required information in its annual, quarterly, proxy statements and special reports to the SEC.

(a) Material information that was omitted includes, but is not limited to: (1) the participation of Eckenrode in the design and implementation of the Eckenrode Plan; (2) the unlawful cross-subsidization by NET and NYT of unregulated affiliates; (3) the unlawful diversification through NYNEX subsidiaries; (4) the failure to make financial statements in accordance with generally accepted accounting principles and applicable instructions; and (4) the pendancy of criminal investigations by Justice. These facts were material to holders of securities registered by NYT, NET, and NYNEX.

(b) NYT, NET, and NYNEX materially misstated their exposure to regulatory liabilities by failing to note in the 1989 annual reports to the SEC the commencement of an FCC audit in January 1989.

88. It was a part of the pattern of racketeering that NYT and NET made materially false statements to the FCC.

(a) False statements in annual reports to the FCC included, but were not limited to, the failure to make financial statements consistent with generally acceptable accounting principals and applicable FCC instructions and regulations.

(b) NYNEX failed to include accurate information for all of its subsidiaries in the capitalization plan which, at times relevant to this complaint, it was required to file pursuant to 47 C.F.R. Part 68 (*"Computer II"*).

(c) According to the audit report of the FCC, NYNEX provided information regarding, among other items, its cash and inventory requirements. As included in the audit report, the information is false. NYNEX also falsely told the FCC staff that MECo provided NYT a "firm contract price" on removals, when in fact it allowed one vendor, Western, to bill job changes to NYT.

89. It was a part of the pattern of racketeering that NYT and NET made materially false statements to the IRS.

(a) As a result of inflated prices paid for capital equipment and capitalized expenses, the asset bases of NYT and NET is overstated by approximately ten percent. Upon information and belief, NYNEX has misstated the value of its assets on returns to the IRS. This has resulted in claims for excessive depreciation expense and improper tax credits.

(b) NYNEX also claimed as business and capital expenses payments that were illegal under state and federal laws. These payments included, but not limited to, payments to affiliates in violation of sections 90(3), 107, and 110(3) of the New York Public Service Law.

90. It was a part of the pattern of racketeering that MECo rigged bids on public utility projects, including the removal contracts at Hertel Avenue, Buffalo and Williamsville. The PSC staff found seventeen instances where NYT awarded removal contracts other than to the lowest bidder; all but three of these were awarded to Western.

91. It was a part of the pattern of racketeering that MECo extorted Discon by placing Discon in fear of economic loss unless Discon participated in unlawful conspiracies. Specifically, MECo threatened to drive Discon "out of business" unless Discon concealed its costs from NYT and helped to defraud a scrap dealer.

92. It was a part of the pattern of racketeering that NYNEX misstated its financial results on state and federal tax returns, deducted illegal payments as legitimate business expenses, and claimed excessive amounts of depreciation in violation of 29 U.S.C. 162(c)(2).

93. It was a part of the pattern of racketeering that NYNEX has caused NYT and NET to subsidize "One-of-a-Kind" services to large customers. NYNEX provides these services below cost in order to prevent the development of economic alternatives (including cable) to its wireline monopoly. NYNEX covers its losses by including these costs in its revenue requirement for tariffed, monopoly services in violation of PSC Order No. 911. Even though these networks lost money, NYT paid huge sales commissions to BISC, an unregulated subsidiary of NYNEX. Since these commission drove NYT's net revenues from these contracts further below the floor of marginal costs they increased the subsidy imposed on residential ratepayers. The sales commissions were fraudulent because (1) they exceeded BISC's actual costs and (2) NYT failed to disclose to the PSC that its marginal costs exceeded revenues after it paid BISC these commissions.

94. It was a part of the pattern of racketeering that NYNEX caused a payment to be made to a discharged

employee of NET who had complained that non-economic transactions with affiliates violated the consent decree. According to her attorney, NET entered into a generous financial settlement on the stated grounds of age discrimination. One of the terms of the settlement was that the discharged employee could not disclose her allegations to Justice.

95. It was a part of the pattern of racketeering that NYNEX placed employees who questioned the Eckenrode Plan and other violations of the consent decree in fear of economic loss. NYNEX agreed to allow and require its employees to carry out the provisions of the consent decree. By contrast, NYNEX fired employees, including Zirkelbach, Michael Burkart, and Tobias Squitieri, who refused to participate in unlawful activities. MECo also retaliated against one of these employees by withholding approximately $21,000 in expense vouchers.

96. NYNEX, which includes NYNEX Corp. and each of its subsidiaries, is an enterprise, as defined in 18 U.S.C. 1961(4). NYT and BISC are also enterprises, as defined in 18 U.S.C. 1961(4). Each enterprise includes attorneys, accountants and other agents whom NYNEX has engaged. Each is an entity or group of individuals associated in fact who engage in and whose activities affect interstate commerce.

97. Each of the schemes that paragraphs 85 through 95 describe involves predicate acts of racketeering, as defined by 18 U.S.C. 1961(1). These predicate acts include, but are not limited to the following:

MAIL FRAUD

98. The use of the United States mails was an integral part of the artifices to defraud described in paragraphs 85 through 90 of this Complaint. Among other fraudulent objectives, NYNEX Corp. and MECo used the United States mail to deceive and defraud Discon, other customers

and suppliers of NYT, and responsible governmental authorities into reasonably believing that MECo was implementing a fair and lawful bidding procedure for NYT procurement.

99. The fraudulent use of the United States mail included, but was not limited to, (a) the mailing by MECo of work assignments on more than 12 occasions from 1984 to 1986; (b) a letter mailed by Richard Bird of NYT on or about December 10, 1985; (c) letters mailed by Waldon Rutter of NYT on March 18, and March 24, 1986, (d) letters mailed by Robert Williams of MECo on or about February 4, 1987 and April 7, 1987; (e) a letter by John Fehr of NYT mailed on or about February 23, 1987, and (f) a letter mailed by Kevin O'Sullivan on or about October 29, 1987. Other fraudulent mail communications are in defendants' exclusive possession and can be uncovered only through discovery.

100. The fraud described in paragraphs 85 through 90 injured Discon in its business (1) by causing Discon to expend resources on preparing bids that were fraudulently represented to be competitive, (2) by causing Discon to expend funds working on contracts said to be awarded to Discon, but then diverted to Western, (3) by causing state and federal authorities to delay or to forego efforts to prevent the illegal transactions that diverted NYT contracts to Western and MECo, and (4) by causing Discon to pay higher telephone rates.

101. Each use of the United States mail is furtherance of the artifices to defraud described in this Complaint constitutes a predicate act.

WIRE FRAUD

102. The use of intrastate and interstate wire communications was an integral part of the artifices to defraud described in paragraphs 85 through 90 of this Complaint. Among other fraudulent objectives, NYNEX

Corp. and MECo used wire communications to deceive and defraud Discon, other customers of NYT, and responsible governmental authorities into reasonably believing that MECo was implementing a fair and lawful bidding procedure for NYT procurement.

103. Specific wire communications that were fraudulent included, but were not limited to, numerous telephone communications between Discon and representatives of MECo and NYT, in which MECo and NYT fraudulently represented that the procurement procedures were fair, orderly and even-handed. On January 18, 1985, O'Reilly tried to defraud Discon in a telephone call. In phone calls between Frank Turrock of MECo, and Faltisco on August 26, 1986 and September 8, 1986, MECo attempted to defraud Discon in connection with bidrigging and outstanding invoices. In a series of phone calls during January and February 1987, Williams also attempted to defraud Discon in connection with outstanding invoices.

103A. An integral part of the schemes to defraud was the remote access by MECo through wire communications of computerized order entry and billing systems. MECo used these systems, known as 725, PEARS, RIS, CB&C, RMDS, TTOES, SHOES, CAPRI, ECRS, PCNIS, CUCRIT, and LIFECOST, to place fraudulent orders and bills to NYT.

103B. Other fraudulent wire communications are in defendants' exclusive possession and can be uncovered only through discovery.

104. The fraud described in paragraphs 85 through 90 injured Discon in its business (1) by causing Discon to expend resources on preparing bids that were fraudulently represented to be competitive, (2) by causing Discon to expend funds working on contracts said to be awarded to Discon, but then diverted to Western, (3) by causing state and federal authorities to delay or to forego efforts to prevent the illegal transactions that diverted NYT con-

tracts to Western and MECo, and (4) by causing Discon to pay higher telephone rates.

105. Each use of the telephone or electronic mail in furtherance of the artifices to defraud described in this Complaint constitutes a predicate act.

FRAUD IN THE SALE OF SECURITIES

106. Defendants misrepresented and failed to disclose facts regarding the assets, expenses, and legal proceedings affecting NYT and NET that were material to owners of registered debt securities of NYT, NET, and NYNEX.

107. Defendants misrepresented and failed to disclose facts regarding legal proceedings that were material to owners of registered equity securities of NYNEX.

108. Each of these acts and omission violated and continue to violate statutory and common law restrictions on fraud in the sale of securities.

109. The fraud in securities injured Discon in its business (1) by allowing NYNEX Corp. to obtain financing for operations that competed with Discon on terms that were more favorable than would have been available if the truth had been disclosed and (2) by causing state and federal authorities to delay or to forego efforts to prevent the illegal transactions that diverted NYT contracts to Western and MECo.

HOBBS ACT

110. It was a part of the part of racketeering that O'Reilly caused scrap in Franklin Street that had been sold to AMAX to be removed and transported to New Jersey and overseas.

112. The theft of these goods injured Discon because O'Reilly retaliated against Discon when it refused to misrepresent facts regarding the theft from AMAX.

110. Defendants' repeatedly extorted Discon by threatening to withhold business or to "put Discon out of business" unless Discon participated in illegal conspiracies.

111. Defendant NYNEX Corp. caused its attorneys to extort the employer of a former NYNEX executive who was providing information regarding Discon to Justice.

112. These acts of extortion injured Discon in its business (1) by causing Discon to become potentially involved in illegal conspiracies, (2) by retaliating against Discon for its failure to participate in illegal conspiracies, and (3) by deterring individuals from providing information regarding Discon to Justice.

113. Each of these acts of extortion violated 18 U.S.C. 1951 and constitutes a predicate act of racketeering.

TRAVEL ACT

114. Joseph Perk and William Flynn of NYT Security travelled from New York to Ohio and from New York to New Jersey in attempts to extort vendors into making false statements against a MECo employee.

115. Lawrence Friedman and other MECo executives travelled from New York to Florida for the purpose of extorting gratuities from vendors seeking business from NYT.

116. Albert Halprin travelled from Virginia to New York for the purpose of agreeing to extort the employer of a person who was providing information regarding Discon to Justice.

117. These trips injured Discon in its business (1) by causing Discon to become potentially involved in illegal conspiracies, (2) by retaliating against Discon for its failure to participate in illegal conspiracies, and (3) by deterring individuals from providing information regarding Discon to Justice.

118. Each of these trips, which were undertaken for the purpose of violating 18 U.S.C. 1951, violated 18 U.S.C. 1952 and constitutes a predicate act of racketeering.

OBSTRUCTION OF JUSTICE

119. Defendants' attempts to conceal information and to delay proceedings in Justice's criminal investigation and in related civil litigation, constitute obstructions of justice.

120. These acts injured Discon in its business (1) by delaying and obstructing enforcement action against illegal acts directed at Discon and (2) by allowing those illegal acts to continue.

121. Each of the acts described above that had the corrupt motivation of delaying these proceedings or concealing information violates 18 U.S.C. 1513 and constitutes a predicate act of racketeering.

OBSTRUCTION OF A CRIMINAL INVESTIGATION

122. By making a financial settlement contingent upon failing to disclose facts to Justice, NYNEX obstructed the conduct of a criminal investigation.

123. These acts injured Discon in its business (1) by delaying and obstructing enforcement action against illegal acts directed at Discon and (2) by allowing those illegal acts to continue.

124. Each such act violates 18 U.S.C. 1510 and constitutes a predicate act of racketeering.

FIRST COUNT
15 U.S.C. 1
(SHERMAN ACT, Section 1)

125. Plaintiff realleges paragraphs 1 through 124 as if fully set forth herein.

126. NYNEX Corp. acquired MECo from AT&T in violation of the consent decree. NYNEX Corp. and NYT conspired with MECo to restrain trade in network services by (1) excluding Discon from bidding directly on regulated projects of NYT and (2) awarding ostensibly competitive bids for other regulated projects to MECo and Western when these companies did not have the best offer.

127. MECo and Western entered into an arrangement to divide the market for network services in New York State and contiguous areas by (1) agreeing that Western would not deal directly with NYT and (2) agreeing that MECo would award virtually all its contracts from NYT to Western as a subcontractor. MECo furthered this agreement by using its authority to certify vendors to exclude Discon and other unaffiliated suppliers from all but a token number of jobs. As a result of this agreement, MECo was able to charge large markups, which NYNEX Corp. caused NYT unlawfully to pass on to monopoly ratepayers.

128. NYNEX Corp. engaged attorneys and accountants to participate in this conspiracy by concealing information from responsible government authorities.

129. NYNEX Corp. and MECo's participation in this combination and in the related conspiracies has violated and continues to violate Section 1 of the Sherman Act, 15 U.S.C. 1.

130. These violations have injured Discon in its property and business. Defendants are therefore jointly and severally liable to Discon for money damages in an amount equal to three times the amount directly and proximately caused. This sum is unknown at this time, but believed to be in excess of $45 million.

131. No remedy at law is adequate to compensate Discon for continuing violations. Discon will suffer additional and irreparable harm unless defendants desist from these violations. Accordingly, this Court should enjoin the continuing violations.

SECOND COUNT
15 U.S.C. 2
(SHERMAN ACT, Section 2)

132. Discon realleges paragraphs 1 through 131 as if fully set forth herein.

133. NYNEX Corp. and MECo attempted to monopolize, and did monopolize, markets for network services in New York State and in contiguous areas. NYNEX and MECo effectively controlled the price at which contracts for network services were obtained. NYNEX and MECo acquired and maintained power to restrict or eliminate competition in this market.

134. Under this arrangement, MECo and Western have maintained at least 75 percent of the market for network services in New York State. The arrangement has substantially lessened and eliminated competition in the market for network services, including the removal, repair and installation of central office equipment in New York and in parts of contiguous states.

135. Because of the restrictions of the consent decree, the regulatory, technical and economic requirements of NYT for network services differ from those of interexchange and independent local carriers in and adjacent to its service area (which includes most of New York State and parts of Connecticut). At times relevant to this complaint, MECo and Western maintained at least 95 percent of the NYT market for network services.

136. This attempt to monopolize and monopolization violated Section 2 of the Sherman Act, 15 U.S.C. 2.

137. These violations injured Discon in its business and property. Defendants are therefore jointly and severally liable to Discon for money damages in an amount equal to three times the amount directly and proximately caused, unknown at this time, but believed to be in excess of $45 million. Discon is also entitled to equitable relief for the reasons stated in paragraph 131.

THIRD COUNT
15 U.S.C. 2
(CONSPIRACY TO MONOPOLIZE)

138. Discon realleges paragraphs 1 through 137 as if fully set forth herein.

139. NYNEX Corp. and MECo combined and conspired with others, including NYT, Western, and LISN, to violate Section 2 of the Sherman Act by monopolizing the markets for network services in New York State.

140. These acts injured Discon in its business and property. Discon is entitled to legal and equitable relief for the reasons set forth in paragraph 130 and 131.

FOURTH COUNT
18 U.S.C. 1962(a)
(RICO)

141. Discon realleges paragraphs 1 through 140 as if fully set forth herein.

142. Through a pattern of racketeering activity, MECo and NYT generated income. MECo and NYT distributed much of this income to NYNEX Corp. or to its subsidiaries. NYNEX Corp., Eckenrode and others caused this income to be invested in enterprises, in violation of 18 U.S.C. 1962(a).

143. The investment by NYNEX Corp. and NYT in MECo enabled MECo to establish its certification process, which NYNEX used to discriminate against Discon.

144. Through noneconomic transfers, MECo invested monies in BISC, and BISC invested monies in Telco Research. The purpose of these chained investments was to disguise the excessive profits that MECo earned by sending them to loss-making affiliates.

145. NYNEX Corp. and others also caused income to be invested in payments, such as that described in para-

graph 122, that required the recipient not to cooperate with state and federal investigators.

146. These acts injured Discon in its business and property by (1) financing MECo's discrimination against Discon, (2) disguising MECo's fraudulent and discriminatory schemes from state and federal regulators, and (3) causing NYT to charge Discon higher telephone rates. Defendants are therefore jointly and severally liable to Discon for money damages in an amount equal to three times the amount directly and proximately caused, unknown at this time, but believed to be in excess of $45 million.

FIFTH COUNT
18 U.S.C. 1962(b)
(RICO)

147. Discon realleges paragraphs 1 through 146 as if fully set forth herein.

148. NYNEX Corp., MECo, Eckenrode and other persons unlawfully and knowingly maintained an interest in and control of NYT through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(b).

149. These acts injured Discon in its business and property. Discon is entitled to damages for the reasons set forth in paragraph 146.

SIXTH COUNT
18 U.S.C. 1962(c)
(RICO)

150. Discon realleges paragraphs 1 through 149 as if fully set forth herein.

151. NYNEX Corp., MECo, Eckenrode, O'Reilly and other persons unlawfully and knowingly conducted and participated in the affairs of NYT through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c).

152. NYNEX Corp., Eckenrode, O'Reilly and other persons unlawfully and knowingly conducted and participated in the affairs of MECo through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c).

153. These acts injured Discon in its business and property. Discon is entitled to damages for the reasons set forth in paragraph 146.

SEVENTH COUNT
18 U.S.C. 1962(d)
(RICO CONSPIRACY)

154. Discon realleges paragraphs 1 through 153 as if fully set forth herein.

155. Defendants conspired and agreed to violate 18 U.S.C. 1962(a), (b), and (c), in violation of 18 U.S.C. 1962(d).

156. Defendants committed other overt acts in furtherance of the conspiracy. These acts included, but were not limited to, (a) the predicate acts of racketeering enumerated in paragraphs 97 through 123 and (b) all acts, whether or not otherwise lawful, that furthered the schemes described in paragraphs 85 through 95.

157. These acts injured Discon in its business and property. Discon is entitled to damages for the reasons set forth in paragraph 146.

EIGHTH COUNT
DONNELLY ACT

158. Discon realleges paragraphs 1 to 157 as if fully set forth herein.

159. Defendants' conduct actually restrained competition in the market for network services in New York State.

160. Defendants' activities violated the General Business Law of New York, Article 22, Section 340.

161. These acts injured Discon in its business and property. Discon is entitled to legal and equitable relief for the reasons set forth in paragraph 130 and 131.

NINTH COUNT
DECEPTIVE BUSINESS PRACTICE

162. Discon realleges paragraphs 1 to 161 as if fully set forth herein.

163. The fraudulent schemes described in paragraphs 85 to 90 constitute deceptive business practices within the meaning of the General Business Law of New York, Article 22-A, Section 349.

164. The deceptive business practices have been recurrent in nature and offensive to the public interest.

165. These acts injured Discon in its business and property. Discon is entitled to damages for the reasons set forth in paragraph 146.

TENTH COUNT
NEW YORK PUBLIC SERVICE LAW

166. Discon realleges paragraphs 1 to 165 as if fully set forth herein.

167. NYNEX Corp. has caused NYT not to file the MECo supply contract to the PSC, as required by the Public Service Law of New York, Article 6, Section 110(3). The payments in excess of reasonable costs that NYNEX Corp. has caused NYT to make to MECo pursuant to this contract are unlawful.

168. NYNEX Corp. and MECo have caused NYT to grant an unreasonable preference or advantage to MECo and to Western in its procurement of network services. This preference constitutes a willful violation of Article 5, Section 90(3) of the Public Service Law.

169. These acts injured Discon in its business and property. Pursuant to Article 5, Section 93 of the Public

Service law, defendants are jointly and severally liable to Discon for money damages caused by these violations. The amount of these damages is unknown at this time, but believed to be in excess of $15 million.

ELEVENTH COUNT
PRIMA FACIE TORT

170. Discon realleges paragraphs 1 to 169 as if fully set forth herein.

171. Through these acts, defendants intentionally caused economic injury to Discon in retaliation for Discon's attempts to compete.

172. Many of these acts, including (but not limited to) the refusal of MECo to deal with Discon, had no motivation other than the desire to injure Discon.

173. Defendants have committed prima facie tort, in violation of the common law of the state of New York.

174. These acts injured Discon in its business and property. Defendants are therefore jointly and severally liable to Discon for money damages in an amount unknown at this time, but believed to be in excess of $15 million.

175. Defendants' actions were directed at the public generally because it sought to defraud ratepayers, bondholders and others of as much as $800 million. To deter recurrence of this conduct, this Court should award punitive damages in the amount of $30 million.

TWELFTH COUNT
THIRD PARTY BENEFICIARY
(MECo SUPPLY CONTRACT)

176. Discon realleges paragraphs 1 to 175 as if fully set forth herein.

177. The MECo Supply Contract requires MECo to maintain reasonable prices and to publish a price list.

178. These provisions seek to induce the general trade to supply NYNEX through MECo by assuring suppliers that MECo will not unreasonably mark up their prices. The disclosure of MECo's prices also allows suppliers to determine where they can effectively compete and reduce prices to NYT and its ratepayers.

179. The MECo supply contract is governed by New York law.

180. These provisions specifically benefit Discon and other general trade suppliers, which can enforce them as third-party beneficiaries.

181. MECo breached its obligation to maintain reasonable, published prices.

182. These acts injured Discon in its business and property, for the reasons stated in paragraph 130.

THIRTEENTH COUNT
THIRD PARTY BENEFICIARY
(CONSENT DECREE)

183. Discon realleges paragraphs 1 to 182 as if fully set forth herewith.

184. The consent decree, which is a court order, also includes a contract whereby AT&T made certain undertakings in return for Justice's agreement not to continue its antitrust action.

185. The contract includes the commitments described in paragraph 24, including the obligation not to discriminate in procurement and to submit a Procurement Compliance Plan.

186. The contract, which expressly required NYNEX to submit a Procurement Compliance Plan, implies a term that the Plan accurately states policies with which NYNEX will attempt in good faith to comply.

187. This contract is governed by the law of the District of Columbia.

188. Defendants are successors to AT&T's obligations under this contract.

189. Discon is a third party beneficiary that may enforce NYNEX contractual obligation not to discriminate in procurement and to comply with the policies stated in the Procurement Compliance Plan.

190. NYNEX's breach of these contractual obligations injured Discon in its business and property. Discon is entitled to damages for the reasons set forth in paragraph 130.

FOURTEENTH COUNT
BREACH OF CONTRACT
(STANDARD SUPPLY CONTRACT)

191. Discon realleges paragraphs 1 to 190 as if fully set forth herewith.

192. The contract described in paragraph 68 implies a covenant of fair dealing, including implied terms (1) that MECo will not arbitrarily disqualify or retaliate against Discon; (2) that MECo would not rig bids or otherwise discriminate against Discon; and (3) that MECo would not force Discon to perform services outside awarded contracts without compensation.

193. MECo's breach of this contract, which NYNEX Corp. induced, injured Discon in its business and property.

FIFTEENTH COUNT
COMMON LAW DEFAMATION

194. Discon realleges paragraphs 1 to 193 as if fully set forth herewith.

195. The false statement made to the PSC that Discon did not intend to receive repayment for the loan requested by a MECo employee injured Discon's reputation and de-

layed action by the PSC against MECo's unlawful procurement practices.

196. NYNEX Corp. attempted to prevent the PSC from disclosing that the defamation had occurred. In May 1990, the PSC determined that its argument lacked any basis in law. Upon information and belief, NYNEX Corp. and MECo may have fraudulently concealed similarly defamatory statements made to prospective customers of Discon.

197. These acts injured Discon in its business and property. Defendants are liable to Discon in an amount not yet ascertained.

SIXTEENTH COUNT
CIVIL CONSPIRACY

198. Discon realleges paragraphs 1 to 197 as if fully set forth herewith.

199. Defendants agreed with other persons known and unknown ("conspirators") to commit the illegal acts described in Counts One through Twelve.

200. The conspirators committed over acts in furtherance of this agreement that injured Discon.

201. Defendants are liable for any adverse consequences of such acts.

202. These acts injured Discon in its business and property. Defendants are liable to Discon in an amount not yet ascertained.

WHEREFORE, plaintiff demands trial by jury and prays for an award of threefold the damages suffered by virtue of the antitrust and racketeering conspiracies, plus additional actual and punitive damages and interest, reasonable attorneys' fees and other costs associated with this suit, in an amount not yet ascertained, but believed to

exceed $75 million; and for an Order granting such further relief as the Court deems just and proper.

Dated: May 25, 1990

/s/ George J. Navagh
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Decision and Order of the District Court,
dated June 23, 1992

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

90-CV-546A

DISCON INCORPORATED,
Plaintiff,

v.

NYNEX CORPORATION,
NYNEX MATERIAL ENTERPRISES,
NEW YORK TELEPHONE,
ROBERT J. ECKENRODE, BERNARD O'REILLY,
Defendants.

DECISION AND ORDER

INTRODUCTION

Defendants, NYNEX Corporation ("NYNEX"), NYNEX Material Enterprises ("MECo"), New York Telephone, Robert J. Eckenrode ("Eckenrode"), and Bernard O'Reilly ("O'Reilly"), have moved to dismiss plaintiff Discon, Incorporated's ("Discon") complaint (the "Complaint"), pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6). They have also moved, pursuant to Fed. R. Civ. P. 11, for sanctions against Discon and its counsel for signing the Complaint because it was not well grounded in fact, law, or a reasonable argument for extension of existing law.

After reviewing the submissions of the parties and hearing argument from counsel, the Court grants defendants'

motion to dismiss the Complaint for failure to state a claim, without prejudice. Defendants' motion for sanctions is denied, also without prejudice.

DISCUSSION

I. *Motion To Dismiss*

In deciding defendants' motion to dismiss the Complaint for failure to state a claim upon which relief can be granted, the Court accepts the well-pleaded factual allegations of the Complaint as true. *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991) (citing *Cooper v. Pate*, 378 U.S. 546 (1964) (per curiam); *Dwyer v. Regan*, 777 F.2d 825 (2d Cir. 1985), *modified on other grounds*, 793 F.2d 457 (2d Cir. 1986)). The allegations of the Complaint must be construed in Discon's favor. *Papasan v. Allain*, 478 U.S. 265, 283 (1986); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Indeed, the Court cannot grant the motion to dismiss unless " 'it is clear that no relief [can] be granted under any set of facts that [can] be proved consistent with the allegations.' " *H.J., Inc. v. Northwestern Bell Tel.*, 492 U.S. 229, 249-50 (1989) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)); *see also Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Application of these familiar principles must be tailored to the circumstances of the case and the nature of the claims that are asserted. *Ricciuti v. New York City Transit Auth.*, 941 F.2d 119, 124 (2d Cir. 1991). In so doing, the Court concludes that Discon's Complaint must be dismissed. However, since dismissal of a complaint pursuant to Rule 12(b)(6) should ordinarily be on terms giving the plaintiff a fair opportunity to correct pleading defects, the dismissal is without prejudice. *See id.* at 123.

A. *The Complaint*

Plaintiff Discon is incorporated in New York State and does business here. It was formed in June of 1984 by

Robert Faltisco to enter the business of providing "network services," which includes the removal, repair and installation of telephone central offices and other equipment used by telephone carriers. The only business activities of Discon described in the Complaint, however, consist of the removal of scrap telephone equipment. Complaint ¶ 50.

Discon was formed to meet a demand created by the January 1, 1984 court-ordered break up of American Telephone and Telegraph Company and its affiliates Western Electric Company, Inc., and Bell Telephone Laboratories, Inc. (collectively "old AT&T") into competing enterprises. Among other things, the terms of the break up of old AT&T require that all carriers of telephone calls between different exchanges have access to other exchanges that are equal in type, price and quality to the access provided to AT&T and its affiliates. *See United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 227 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).[1] To adhere to this requirement, telephone carriers found it necessary to replace equipment in their many central offices with equipment compatible with that of other carriers.

From the time it was formed in June of 1984, through 1986, Discon supplied central office equipment removal services to New York Telephone. New York Telephone is a provider of local telephone exchange service in most of New York State and in some portions of Connecticut.

[1] The description of the break up of old AT&T alleged in Discon's Complaint is incoherent. The Court has examined portions of Judge Greene's decision approving the Modified Final Judgment in *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), to shed light on the factual background to the Complaint. *See Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991) (factual matters not incorporated in a complaint may be considered on a motion to dismiss under Rule 12(b)(6) if they are proper for judicial notice).

New York Telephone was Discon's principal customer, if not its only one.

New York Telephone is a wholly owned subsidiary of NYNEX. Because New York Telephone is in a business subject to the New York State Public Service Law, its profits are regulated. NYNEX's, on the other hand, are not.

AT&T Technologies, Inc. ("Technologies") is the former Western Electric Company, Inc., and it is a supplier of network services among its other operations. The Complaint refers to Technologies as "Western." In the course of its network services business, Technologies supplies central office equipment removal services to New York Telephone. Technologies was Discon's number one competitor.

Discon alleges that NYNEX, New York Telephone and Technologies conspired to prevent Discon from supplying network services to New York Telephone. It further alleges that NYNEX made another of its subsidiaries, MECo, New York Telephone's purchasing agent, and that MECo favored Technologies over Discon when purchasing central office equipment removals required by New York Telephone.

MECo was allegedly motivated to favor Technologies over Discon, and to undermine Discon, so that it could markup the price of central office removals it was charging its regulated affiliate, New York Telephone. MECo's inflated prices for central office removals made for high profits, some of which MECo paid to NYNEX as dividends. The alleged arrangement thereby permitted NYNEX, MECo and Technologies to realize exorbitant profits on central office removals at the expense of New York Telephone's ratepayers that were beyond regulatory scrutiny.

Discon alleges that it "inherently" threatened to expose the divergent economic interest of New York Telephone

and MECo. For example, if Discon started to bid directly to New York Telephone, New York Telephone managers would learn its true prices and would then question the NYNEX policy of allowing markups. Likewise, in the event that Discon's low costs became known to regulators, they could disallow the high costs that New York Telephone passed on to its ratepayers. Discon alleges that these concerns led MECo to discriminate against Discon, even though its lower prices could have allowed higher markups.

Discon continued to do work for New York Telephone until June 1986, when it was suspended as a supplier eligible to offer central office removal services to New York Telephone. The Complaint alleges that Discon stopped working for New York Telephone after Discon hired a former employee of MECo, Robert Zirkelbach. Zirkelbach had resigned from MECo on July 9, 1985 after an internal investigation by New York Telephone Security. The Complaint states that New York Telephone "falsely told the [Public Service Commission] that Discon had made Zirkelbach a loan [while Zirkelbach was working for MECo] that it did not expect to be repaid." Complaint ¶ 75.

The Complaint refers to a number of alleged incidents in which defendants treated Discon unfairly. According to the Complaint, "MECo forced Discon to accept obligations outside its contract, to forego billing job changes and to dispose of scrap on non-economic terms." Complaint ¶ 59. Further, MECo executives "upbraided" Discon for dealing directly with New York Telephone and disclosing the price of a removal job. Complaint ¶¶ 62-63. The Complaint also alleges that O'Reilly instructed Discon "to 'salt' scrap . . . . by placing higher grade switches on top," Complaint ¶ 66, and "directed Faltisco . . . to remove wire spring relays from scrap sold to AMAX [Copper]." Complaint ¶ 67. It further alleges that MECo discriminated against Discon and in favor of Technologies

by allowing Technologies to use a prepaid billing system, Complaint ¶ 56, and by awarding Technologies written contracts and authorizations for three jobs whose value exceeded one million dollars. Complaint ¶ 57.

Discon alleges that, as a result of defendants' actions, it was forced to discontinue most of its business operations. It claims to be a victim of the same kind of anti-competitive conduct that led to the breakup of the old AT&T in the early 1980's and seeks damages likely to be in excess of $45,000.000.[2]

B. *Restraint of Trade Claim*

Section 1 of the Sherman Act provides that: "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. The First Count of the Complaint purports to allege that NYNEX, New York Telephone and MECo conspired to restrain trade in network services in violation of § 1 of the Sherman Act. Complaint ¶¶ 125-31. More specifically, it alleges that NYNEX conspired with its subsidiaries, MECo and New York Telephone, as well as with Technologies, to exclude Discon from New York Telephone's network services business and to award virtually all of the work to Technologies. Complaint ¶¶ 126-127.

The Sherman Act was enacted "for 'the protection of *competition*' " in business and commercial transactions. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original)). To state a claim under § 1 of the Sherman Act, Discon

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[2] Technologies is named as a defendant in a related action filed by Discon that is pending before this Court. *Discon, Inc. v. AT&T Technologies, Inc.*, Civ. 90-954A. The *AT&T Technologies, Inc.* case involves similar theories of recovery and a motion to dismiss is pending.

must allege that: (1) the NYNEX defendants entered into a "contract, combination . . . or conspiracy"; and (2) that the conspiracy was "in restraint of trade or [interstate] commerce." *See International Distribution Centers, Inc. v. Walsh Trucking*, 812 F.2d 786, 793 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987). Because Discon alleges neither conduct restraining trade nor a conspiracy, its first claim fails to state a cause of action upon which relief can be granted. Accordingly, it is dismissed.

The Complaint alleges that "NYNEX Corp. and New York Telephone conspired with MECo to restrain trade." Complaint ¶ 126. This accusation fails to state a claim because the Complaint admits that New York Telephone and MECo are wholly owned subsidiaries of NYNEX, Complaint ¶¶ 12-13, and the Supreme Court has held that, as a matter of law, a corporation and its wholly owned subsidiaries "are incapable of conspiring with each other for purposes of § 1 of the Sherman Act." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984).

In *Copperweld*, the Supreme Court held that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act." *Id.* at 771. Restraint of trade by a single enterprise, without a conspiracy or combination, is not unlawful under § 1. *Id.* at 767 n.13. The Court concluded that it is impossible for a corporation and its wholly owned subsidiary to conspire with each other under § 1 and that:

> [i]ndeed, the very notion of an "agreement" in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning . . . [I]n reality a parent and a wholly owned subsidiary *always* have a "unity of purpose of common design." They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests.

Id. at 771-72 (quoting *American Tobacco Co. v. United States*, 328 U.S. 781-810 (1946) (emphasis in original)). Thus, under *Copper-weld*, any claim that NYNEX, New York Telephone and MECo conspired to violate § 1 must be dismissed. *See Frantz v. United States Powerlifting Fed.*, 836 F.2d 1063, 1064-67 (7th Cir. 1987).

In addition to the intracorporate "conspiracy" alleged in ¶ 126, the Complaint also alleges that:

> MECo and [Technologies] entered into an agreement to divide the market of network services in New York State and contiguous areas by (1) agreeing that [Technologies] would not deal directly with [New York Telephone] and (2) agreeing that MECo would award virtually all its contracts from [New York Telephone] to [Technologies] as a subcontractor.

Complaint ¶ 127. The alleged arrangement is not a "horizontal" division of a market between competitors, but is, instead, a "vertical" arrangement between a buyer of services, the NYNEX companies, and a seller of services, Technologies. This allegation fails to state a claim under § 1 of the Sherman Act because the facts alleged in the Complaint show only a unilateral decision by the NYNEX companies to deal with Technologies and not to deal with Discon.

A company "of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *see also United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *Pants 'N' Stuff Shed House, Inc. v. Levi Strauss & Co.*, 619 F. Supp. 945, 947 (W.D.N.Y. 1985). The Supreme Court has held that the Sherman Act permits a company to announce that it will do business only with companies that acquiesce

to certain nonprice conditions and to refuse to do business with those who fail to comply. *See, e.g., Monsanto,* 465 U.S. at 761; *Colgate,* 250 U.S. at 307.

The Second Circuit has stressed that when a firm stops purchasing from one supplier and starts purchasing from another, "the fact that an agreement between the buyer and the new supplier is necessarily involved does not make it an illegal conspiracy" under the Sherman Act. *Nifty Foods Corp. v. Great Atl. & Pac. Tea Co.,* 614 F.2d 832, 841 (2d Cir. 1980) (citations omitted). Even if the new supplier "solicited the transfer of business" from the buyer, it would not constitute an illegal conspiracy. *Id.; see also Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71, 78 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970). Section 1 of the Sherman Act will only be implicated when there is a conspiracy with other parties "in an effort to force [a seller] to comply with fixed prices." *Pants 'N' Stuff Shed House, Inc.,* 619 F. Supp. at 947.

In the instant case, the Complaint does not allege a conspiracy between NYNEX and other parties "to force [a seller] to comply with fixed prices." It merely alleges that NYNEX announced in advance that it would only do business with companies that dealt with MECo rather than with New York Telephone directly, and that it refused to do business with those who failed to comply with this condition. This is a nonprice condition that is not violative of § 1 of the Sherman Act so long as it was implemented independently. *Monsanto,* 465 U.S. at 761. Thus, in order to succeed on its § 1 restraint of trade claim, Discon must be prepared to prove, through direct and circumstantial evidence, facts tending to exclude the possibility that NYNEX's conduct was unilaterally undertaken. *Id.* at 764, 767. Discon has failed to plead such facts. This failure to specify what "concerted actions these parties took to further their [alleged] goal" requires

dismissal.[3] *Teletronics Proprietary Ltd. v. Medtronic, Inc.,* 687 F. Supp. 832, 837 (S.D.N.Y. 1988); *see also Eastway Const. Corp. v. City of New York,* 762 F.2d 243, 250 (2d Cir. 1985).

Discon attempts to bolster its conclusory allegations of a conspiracy by claiming that it is the victim of precisely the sort of anticompetitive conduct that led to the break up of AT&T. That argument, however, only confirms the vast breadth of the factual controversy Discon seeks to incite with this action and underscores the need for a fair level of coherent detail in Discon's Complaint. Indeed, Discon endeavors to relitigate much of the conduct underlying the break up of old AT&T. Defendants should not be put to the expense of such a large antitrust action absent a well pleaded cause of action. *See Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 528 n.17 (1983) ("[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."). Unless Discon comes to grip with the law it seeks to apply and interposes a plain statement of its claims, this action will not survive.[4]

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[3] Because N.Y. Gen. Bus. Law § 340 *et. seq.* ("Donnelley Act") generally conforms and is interpreted in the same manner as the Sherman Act, *Anheuser Busch v. Abrams,* 71 N.Y.2d 327, 525 N.Y.S.2d 816 (1988), the Eighth Count of the Complaint is dismissed for the reasons stated here.

[4] Defendants' challenge to Discon's standing—which is founded on the tautology that Discon alleges no antitrust injury because it alleges no antitrust violation—need not be addressed. Further, the Court need not reach defendants' argument that Discon's § 1 claim fails because it does not allege a relevant market. *See Image Technical Servs., Inc. v. Eastman Kodak Co.,* 903 F.2d 612 (9th Cir. 1990), *aff'd,* 1992 WL 119156 (U.S. June 8, 1992) (whether single product parts and services can constitute relevant market for a § 1 tying claim).

C. *Monopoly Claims*

Section 2 of the Sherman Act provides that: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2. The Second Count of the Complaint purports to allege that defendants monopolized and attempted to monopolize the market of network services in New York State and contiguous areas. Complaint ¶ 133. The Third Count of the Complaint purports to allege that defendants conspired amongst themselves and with others to monopolize the market for network services in New York State. Complaint ¶ 139. The Court addresses these theories *seriatim*.

1. *Monopoly*

The elements of monopolization under § 2 are: "(1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council*, 857 F.2d 55, 73 (2d Cir.), *cert. denied*, 487 U.S. 1219 (1988) (citations omitted). In its Complaint, Discon alleges that:

> NYNEX Corp. and MECo attempted to monopolize, and did monopolize, markets for network services in New York State and in contiguous areas. NYNEX and MECo effectively controlled the price at which contracts for network services were obtained. NYNEX and MECo acquired and maintained power to restrict or eliminate competition in this market.

Complaint ¶ 133. Discon fails to state a claim for monopolization, however, because defendants do not participate

as competitors in the same market as Discon. *See FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1030 (2d Cir. 1976) (§ 2 claim dismissed because defendant did not compete in relevant market), *cert. denied*, 429 U.S. 1097 (1977). Neither NYNEX nor MECo are competitors in the market of suppliers. MECo buys network services, while Discon sells network services. The Complaint admits that MECo purchased network services for New York Telephone, Complaint ¶¶ 13, 51, 61, and that MECo is the purchasing arm of NYNEX and New York Telephone. Complaint ¶ 13. NYNEX and MECo, therefore, cannot be liable for monopolizing a business in which they do not compete. *See Official Airlines Guides, Inc. v. FTC*, 630 F.2d 920, 926 (2d Cir. 1980) (rejecting monopolization claim because defendant "is engaged in a different line of commerce" than the market allegedly affected), *cert. denied*, 450 U.S. 917 (1981); *FLM Collision Parts, Inc.*, 543 F.2d at 1030; *Addino v. Genesee Valley Medical Care, Inc.*, 593 F. Supp. 892, 901 (W.D.N.Y. 1984) (alternative ground for dismissal of § 2 claim was that defendant was not a competitor of plaintiffs); *see also White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 104-05 (4th Cir. 1987) (hospital and plaintiff neurologist did not compete); *Mercy Peninsula Ambulance, Inc. v. County of San Mateo*, 791 F.2d 755, 759 (9th Cir. 1986) (rejecting ambulance company's challenge to county's award of exclusive contract to competitor because county was not a competitor in the market for healthcare provision). Thus, Discon's § 2 monopolization claim is dismissed.

2. *Attempted Monopolization*

The Second Count of the Complaint also purports to allege that defendants attempted to monopolize the market for network services in New York State. Complaint ¶ 133. There are three elements in an attempted monopolization claim: "(1) anticompetitive or exclusionary conduct; (2) specific intent to monopolize; and (3) a dangerous

probability that the attempt will succeed." *Volvo N. Am. Corp.*, 857 F.2d at 73-74 (citations omitted). Discon's Complaint does not allege specific intent. Complaint ¶¶ 132-137. Specific intent to monopolize is a necessary element of a claim based on attempt to monopolize, *id.*, and generalized allegations of intent are insufficient. *Cf. United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 572 (2d Cir. 1961); *Blaine v. Meineke Discount Muffler Shops, Inc.*, 670 F. Supp. 1107, 1110-11 (D. Conn. 1987). Accordingly, Discon's attempted monopolization claim must be dismissed.

Moreover, to allege a dangerous probability of success of an attempt to monopolize, Discon must allege market power. *See Twin Laboratories, Inc. v. Weider Health & Fitness, Inc.*, 900 F.2d 566, 570 (2d Cir. 1990). As stated previously, defendants do not compete in the same market as Discon. As the court stated in *Capital Imaging Assoc. P.C. v. Mohawk Valley Medical Assoc.*, 725 F. Supp. 669 (N.D.N.Y. 1989):

> It is clear to this court that plaintiff and defendants are not competitors. Plaintiff is in the business of selling radiological services; defendants are not. . . . Not only is there no *dangerous probability* that defendants will succeed in monopolizing the markets identified by plaintiff, there is no present *possibility* defendants wll do so.

Id. at 678 (emphasis in original); *see also International Distribution Centers, Inc.*, 812 F.2d at 790-91; *Nifty Foods Corp.*, 614 F.2d at 841; *Soap Opera Now, Inc. v. Network Publishing Corp.*, 737 F. Supp. 1338, 1347 n.12 (S.D.N.Y. 1990); *Theater Party Assoc. v. Shubert Org.*, 695 F. Supp. 150, 156 (S.D.N.Y. 1988). Thus, because Discon fails to adequately allege a dangerous probability that defendants would succeed in attempting to monopolize network services in New York State, its attempt to monopolize claim must be dismissed.

3. *Conspiracy to Monopolize*

The Third Count of the Complaint purports to allege that defendants conspired amongst themselves and with others to monopolize the market for network services in New York State. Complaint ¶¶ 138-140. The elements of a conspiracy to monopolize claim are: "(1) concerted action, (2) overts acts in furtherance of the conspiracy, and (3) specific intent to monopolize." *Volvo N. Am. Corp.*, 857 F.2d at 74. Discon fails to allege any concerted action, whatsoever. Further, it fails to allege specific intent to monopolize. "Although the Federal Rules permit statement of ultimate facts, a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal." *Heart Disease Research Found. v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972). In the end, Discon's conspiracy claim amounts to nothing more than allegations of a joint decision by NYNEX, New York Telephone and MECo to buy from Technologies and not from Discon. Under *Copperweld*, such intracorporate conduct simply does not violate the Sherman Act. *See City of Mount Pleasant, Iowa v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 274 (8th Cir. 1988).

D. *RICO Claims*

In the Fourth, Fifth, Sixth and Seventh Counts of the Complaint, Discon claims that defendants are liable under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"). Complaint ¶¶ 141-57. RICO provides a civil remedy for any person "injured in his business or property by reasons of a violation of § 1962 of this chapter. . ." 18 U.S.C. § 1964(c). Section 1962, in turn, is divided into four subsections each of which sets out a separate type of prohibited activity involving a "pattern of racketeering activity" or the collection of an unlawful debt. 18 U.S.C. § 1962. "Racketeering activity" is defined in the statute to include various federal and state criminal law offenses such as mail fraud,

wire fraud, fraud in the sale of securities, extortion and obstruction of justice. 18 U.S.C. § 1961(1). A "pattern of racketeering activity" consists of at least two predicate acts violating the criminal statutes listed in § 1961(1) within ten years of the claim, where the acts were related and amount to continuing criminal activity, or by their nature pose a likelihood of continuing criminal activity. *H.J. Inc.*, 492 U.S. at 239. Allegations that a defendant has engaged in predicate acts of racketeering activity are necessary prerequisites for stating a claim under any subsection of § 1962.

After carefully reviewing Discon's RICO claims, the Court finds that Discon has failed to plead the predicate acts of mail fraud, wire fraud and fraud in the sale of securities with the particularity required under Fed. R. Civ. P. 9(b) and the allegations in the Complaint regarding these predicate acts must therefore be dismissed. In addition, the Court finds that Discon has failed to allege facts stating a claim under any of the subsections of § 1962. Thus, the Fourth, Fifth, Sixth and Seventh Counts in the Complaint are dismissed.

1. *Pleading Fraud With Particularity Under Rule 9(b)*

Rule 9(b) provides, in pertinent part, that:

> In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity. Malice, intent, knowledge and other conditions of mind may be averred generally.

"Rule 9(b) is designed to provide the defendant fair notice of the plaintiff's claims, and to enable the defendant to prepare a suitable defense, protect his reputation or good will from harm, and reduce the number of strike suits." *O'Brien v. Price Waterhouse*, 740 F. Supp. 276, 279 (S.D.N.Y. 1990), *aff'd*, 936 F.2d 674 (2d Cir. 1991). Because of the potential harms attendant to being

labelled a racketeer, these aims are even more compelling in civil RICO actions. *See Lou v. Belzberg*, 728 F. Supp. 1010, 1024 (S.D.N.Y. 1990); *Philan Ins. Ltd. v. Frank B. Hall & Co.*, 712 F. Supp. 339, 344 (S.D.N.Y. 1989); *Harrison v. Enventure Capital Group, Inc.*, 666 F. Supp. 473, 478 (W.D.N.Y. 1987).

The Second Circuit has imposed stringent pleading requirements on plaintiffs who make allegations of fraud. "[T]he 'complaint must adequately specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff[] contend[s] the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements.'" *McLaughlin v. Arthur Anderson*, No. 91-6184, slip op. at 3214 (2d Cir. Apr. 21, 1992) (quoting *Cosmas v. Hassett*, 886 F.2d 8, 11 (2d Cir. 1989)); *see also DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987) (plaintiffs must specify the "time, place, speaker and content of the alleged misrepresentations."); *Luce v. Edelstein*, 802 F.2d 49, 54 (2d Cir. 1986). A plaintiff asserting mail fraud also must identify the purpose of the mailing within the defendant's fraudulent scheme. *McLaughlin v. Arthur Anderson*, No. 91-6184, slip op. at 3214 (2d Cir. Apr. 21, 1992) (citations omitted).

Further, the plaintiff must supply a factual basis for allegations of scienter that "give rise to a 'strong inference' that the defendants possessed the requisite fraudulent intent." *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 50 (2d Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988). The allegations must show a motive and a clear opportunity for committing fraud, or circumstances clearly indicating conscious participation in the fraud. *Beck*, 820 F.2d at 50; *O'Brien v. National Property Analysts Partners*, 719 F. Supp. 222, 226 (S.D.N.Y. 1989).

Where multiple defendants are charged, "the complaint should inform each defendant of the nature of his alleged

participation in the fraud." *DiVittorio*, 822 F.2d at 1247. "[T]he wholesale naming of directors and officers of corporations without any indication of the role of the individual defendants" is not enough. *The Limited, Inc. v. McCrory Corp.*, 645 F. Supp. 1038, 1043 n.10 (S.D.N.Y. 1986). Instead, "specific allegations must be made with respect to each particular individual." *Leslie v. Minson*, 679 F. Supp. 280, 284 (S.D.N.Y. 1988).

Applying these principles to the case at hand, the Court finds that Discon's Complaint fails to plead the predicate acts of mail fraud, wire fraud and fraud in the sale of securities with the requisite particularity.[6]

Discon alleges that the predicate acts of racketeering included mail fraud. Complaint ¶¶ 98-101. Discon's Complaint, however, merely lists letters allegedly sent, and fails entirely to specify what statements were made in the letters, the manner in which the statements in the letters were false or misleading, their connection or relation to the particular defendants, or the purpose of the letters in defendants' fraudulent scheme. Thus, the Complaint fails to allege any predicate act of mail fraud with the requisite particularity. *See McLaughlin v. Arthur Anderson*, No. 91-6184, slip op. at 3214-20 (2d Cir. Apr. 21, 1992); *Harrison*, 666 F. Supp. at 478.

Discon also alleges that the predicate acts of racketeering included wire fraud. Complaint ¶¶ 102-105. Again, however, the Complaint fails to describe any acts with the necessary particularity. The Complaint specifies three telephone calls that were allegedly made in furtherance of defendants' scheme, but fails to allege the contents of any of the calls, how the communications were false or misleading, the relationship of the communications to each of the various defendants, or the purpose of the phone calls in defendants' fraudulent scheme. Thus, the Complaint fails to allege any predicate act of wire fraud with the requisite particularity.

[6] Defendants argue that Rule 9(b) should also be applied to the predicate acts of extortion and obstruction of justice that are alleged in the Complaint. "However, Rule 9(b) applies only to claims of fraud or mistake." *McLaughlin v. Arthur Anderson*, No. 91-6184, slip op. at 3221 (2d Cir. Apr. 21, 1992) (citing *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990)).

The Complaint further alleges fraud in the sale of securities. Complaint ¶¶ 106-109. It fails, however, to specify any particular statement that was false, any particular document in which a false statement appeared or in which there was a material omission, any reason why the allegedly false statements were fraudulent, any particular security purchased by Discon, or the specific role of each defendant in the alleged fraud. Thus, the Complaint fails to allege any predicate act of fraud in the sale of securities with the requisite particularity.

In sum, because the allegations in the Complaint regarding the predicate acts of mail fraud, wire fraud and fraud in the sale of securities consist of conclusory statements lacking any of the particular details required under Rule 9(b), they must be dismissed.

On January 22, 1991, the Judges of this District adopted a Standing Order applicable to all civil RICO claims filed in the District. If Discon elects to interpose an amended complaint in this action that asserts a RICO claim, it must file a RICO Case Statement in compliance with the January 22, 1991 Standing Order when it files its amended complaint.

Compliance with the Standing Order is not a substitute for a well pleaded claim, however. Discon's counsel has represented to the Court that Discon has gathered evidence supporting all of its allegations. He represented that Discon kept contemporaneous records of defendants' wrongdoing, though of what sort he did not say. He represented that he has affidavits from former employees of defendants, and voluminous records of proceedings before the Public Service Commission. Accordingly, Discon

should be able to allege particular facts supporting its allegations of racketeering. In any case, Discon is cautioned that the Court will not hesitate to dismiss with prejudice a RICO claim in an amended complaint that does not comply with the Rule 9(b) principles of this Circuit.

2. *Section 1962(a) Claim*

The Fourth Count of the Complaint purports to allege that defendants are liable under 18 U.S.C. § 1962(a), which prohibits the investment in an interstate enterprise of income derived from "a pattern of racketeering activity or through collection of an unlawful debt." 18 U.S.C. § 1962(a). "[T]o state a claim for civil damages under § 1962(a), a plaintiff must allege injury from the defendants' investment of racketeering income in an enterprise." *Ouaknine v. MacFarlane*, 897 F.2d 75, 83 (2d Cir. 1990). It is not enough for plaintiff to allege injury from the predicate acts because "the essence of a violation of § 1962(a) is not commission of predicate acts, but investment of racketeering income." *Id; see also Azurite Corp. v. Amster & Co.*, 730 F. Supp. 571, 579 (S.D.N.Y. 1990); *Rhone v. Energy North, Inc.*, No. 91-11996, slip op. (D.Mass. Dec. 27, 1991), 1991 WL 332251.

In the instant case, the injury described in the Complaint is merely that defendants' investment in New York Telephone and MECo enabled those enterprises to pursue the activities alleged as predicate offenses. Complaint ¶¶ 143-146. Discon fails to allege a distinct "investment injury" as required in *Oauknine*. Thus, the § 1962(a) claim must be dismissed for failure to state a claim upon which relief may be granted.

3. *Section 1962(b) Claim*

The Fifth Count of the Complaint purports to allege that NYNEX, MECo and Eckenrode violated 18 U.S.C. § 1962(b) by maintaining an interest in and control of New York Telephone through a pattern of racketeering

activity. Complaint ¶ 148. This claim must be dismissed as time-barred.

In *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 152 (1987), the Supreme Court held that the four-year statute of limitations of the Clayton Act applies in all civil RICO actions. Section 1962(b) states that it is unlawful to acquire or maintain an interest in, or control of, an enterprise through a pattern of racketeering activity or collection of an unlawful debt. 18 U.S.C. § 1962(b). NYNEX acquired its control or interest in New York Telephone on January 1, 1984 upon the divestiture of old AT&T. Complaint ¶ 23. Since that time, New York Telephone has been a wholly owned subsidiary of NYNEX. Discon's Complaint was not filed until May 25, 1990, more than four years after NYNEX's acquisition of control of New York Telephone. If or when Discon interposes an amended complaint stating a § 1962(b) claim, it must specifically identify predicate acts that occurred within the statute of limitations period that would constitute a violation of § 1962(b).

4. *Section 1962(c) Claim*

In the Sixth Count of the Complaint, Discon purports to allege a claim under 18 U.S.C. § 1962(c). More specifically, it alleges that NYNEX, MECo, Eckenrode and O'Reilly conducted and participated in the affairs of New York Telephone through a pattern of racketeering activity, Complaint ¶ 151, and that NYNEX, Eckenrode and O'Reilly conducted and participated in the affairs of MECo through a pattern of racketeering activity. Complaint ¶ 152.

A RICO plaintiff suing for damages under § 1964(c), based upon a violation of § 1962(c), "only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). Such a claim must be dismissed

if it does not allege facts showing that damage to plaintiff's business or property was proximately caused by the alleged predicate acts of racketeering activity. *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990); *Hecht*, 897 F.2d at 23; *Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634, 636 (2d Cir. 1989); *Birdick v. American Express Co.*, 865 F.2d 527, 529 (2d Cir. 1988); *Sperber v. Boesky*, 849 F.2d 60, 64-65 (2d Cir. 1988). Discon's Complaint fails to allege facts showing that any of the alleged predicate acts proximately caused injury to Discon and, therefore, the § 1962(c) claim must be dismissed.

Defendants also argue that the § 1962(c) claim should be dismissed because Discon fails to allege a RICO "enterprise" distinct from the "persons" allegedly committing the RICO violation. The Court rejects this argument.

To state a claim under § 1962(c), a plaintiff must allege that the "persons" committing the RICO violation were distinct from the "enterprise" conducted unlawfully. *Bennett v. United States Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986). In paragraph 151 of the Complaint, Discon alleges that NYNEX, MECo, Eckenrode and O'Reilly were "persons" participating in the affairs of an "enterprise," New York Telephone, through a pattern of racketeering activity. Likewise, in paragraph 152, Discon alleges that NYNEX, Eckenrode and O'Reilly were "persons" participating in the affairs of an "enterprise," MECo, through a pattern of racketeering activity.

Defendants argue that, since NYNEX owns MECo and New York Telephone, Eckenrode is employed by NYNEX, and O'Reilly is employed by MECo, the "persons" and "enterprises" alleged in the Complaint are really all one and the same entity, and the § 1962(c) claim must therefore be dismissed pursuant to *Bennett*. However, while MECo, New York Telephone, Eckenrode and O'Reilly are all either subsidiaries or employees of the same entity,

NYNEX, the Second Circuit has expressly held that a defendant may be a "RICO person and one of a number of members of the RICO 'enterprise.'" *Cullen v. Margiotta*, 811 F.2d 698, 730 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987). In other words, "[w]here the overlap between the defendants and the alleged RICO enterprise is only partial, a RICO claim may be sustained." *Jacobson v. Cooper*, 882 F.2d 717, 720 (2d Cir. 1989).

The alleged RICO "persons" in this case are NYNEX, MECo, New York Telephone, Eckenrode and O'Reilly. However, the only RICO "enterprises" alleged are MECo and New York Telephone. Thus, there is not a complete identity between the RICO "persons" and the RICO "enterprises." Accordingly, dismissal of the § 1962(c) claim based on a failure to allege a RICO "person" distinct from the RICO "enterprise" is not required.

5. *Section 1962(d) Claim*

The Seventh Count of the Complaint purports to allege that defendants conspired and agreed to violate 18 U.S.C. §§ 1962(a), (b) and (c), in violation of 18 U.S.C. § 1962(d). Complaint ¶ 154-157. This claim must fail, however, for two reasons.

First, Discon's RICO conspiracy claim must be dismissed because "[a] claim cannot be made under § 1962(d) in the absence of a viable claim under § 1962(a), (b) or (c)." *Leonard v. Shearson Lehman/Am. Express, Inc.*, 687 F. Supp. 177, 182 (E.D. Pa. 1988). Since Discon's §§ 1962(a), (b) and (c) claims fail for the reasons explained above, its § 1962(d) claim necessarily must fail.

Second, the Complaint does not specifically allege that the defendants agreed to commit specific predicate acts. "[A] RICO civil conspiracy complaint, at the very least, must allege specifically such an agreement." *Hecht*, 897 F.2d at 25. "Conclusory allegations or bare statements

. . . will not withstand a motion to dismiss . . . ." *First City Nat'l Bank & Trust Co. v. FDIC*, 730 F. Supp. 501, 509 (E.D.N.Y. 1990). "[T]he complaint must allege some factual basis for a finding of conscious agreement among the defendants." *Hecht*, 897 F.2d at 26 n. 4. Discon fails to allege such facts. Thus, its § 1962(d) claim is dismissed.

E. *Consumer Protection Act Claim*

The Ninth Count of the Complaint purports to allege that defendants violated the New York Consumer Protection Act, which is codified in N.Y. Gen. Bus. Law § 349. Complaint ¶¶ 162-165. The essential elements of a claim under the Consumer Protection Act are: (1) that the act or practice complained of was misleading in a material respect, *Geismar v. Abraham & Strauss*, 109 Misc.2d 495, 496, 439 N.Y.S.2d 1005, 1006 (Dist. Ct. Suffolk Co. 1981); (2) that the plaintiff was injured, *McDonald v. North Shore Yacht Sales, Inc.*, 134 Misc.2d 910, 914, 513 N.Y.S.2d 590, 593 (Sup. Ct. Nassau Co. 1987); (3) reliance by the plaintiff upon the alleged misrepresentations to his detriment, *Copeland v. Weyerhaeuser Co.*, 124 A.D.2d 998, 999, 509 N.Y.S.2d 227, 228 (4th Dept. 1986), *appeal dismissed*, 69 N.Y.2d 944, N.Y.S.2d 656 (1987); *Butler v. Caldwell & Cook, Inc.*, 122 A.D.2d 559, 560, 505 N.Y.S.2d 288, 290 (4th Dept. 1986); *Burns v. Volkswagon of Am., Inc.*, 118 Misc.2d 289, 291-92, 460 N.Y.S.2d 410, 413 (Sup. Ct. Monroe Co. 1982), *aff'd*, 97 A.D.2d 977, 468 N.Y.S.2d 1017 (4th Dept. 1983), *appeal dismissed*, 61 N.Y.2d 604, 473 N.Y.S.2d 1025 (1984); and (4) that the practice complained of comes within the intended scope of the statute. *Genesco Entertainment v. Koch*, 593 F. Supp. 743, 751-52 (S.D.N.Y. 1984).

Discon's Complaint fails to plead the necessary element of reliance. *See Copeland*, 124 A.D.2d at 999, 509 N.Y.S.2d 228; *Burns*, 118 Misc.2d at 291-92, 460

N.Y.S.2d at 413. The alleged deceptive practices identified in the Complaint are those described in paragraphs 85 to 90, but the Complaint does not allege that Discon relied upon any of those alleged deceptive practices. The Consumer Protection Act claim is therefore dismissed.

This claim also should be dismissed because the alleged injury does not fall within the scope of the Consumer Protection Act. "The typical violation contemplated by the statute involves an individual consumer who falls victim to misrepresentations made by a seller of consumer goods usually by way of false and misleading advertising." *Genesco Entertainment*, 593 F. Supp. at 751-52. Discon's Consumer Protection Act claim falls entirely outside this area. Discon is a supplier of services, not a consumer, and is alleging a general business or commercial injury. "[T]o extend this remedy [provided by the Consumer Protection Act] to plantiff[] would alter completely the legal duties governing commercial relationships in New York." *Id.* Thus, Discon's Consumer Protection Act claim must be dismissed.

F. *Public Service Law Claim*

The Tenth Count in the Complaint purports to allege a claim under N.Y. Pub. Serv. Law § 93. The essential elements of a claim under § 93 are loss or damage caused by gross negligence or willful misconduct of a telephone company where the defendant has disobeyed a positive command or injunction of the Public Service Commission. N.Y. Pub. Serv. Law § 93. Disobedience of a positive command or injunction of the Commission is a prerequisite to a private right of action under § 93. *See, e.g., Meyerson v. New York Tel. Co.*, 65 Misc.2d 693, 696, 318 N.Y.S.2d 900, 903 (Sup. Ct. Kings Co. 1971); *Leighton v. New York Tel. Co.*, 187 Misc. 132, 134, 61 N.Y.S.2d 112, 114 (Sup. Ct. N.Y. Co. 1946); *Carlson Constr. Co. v. New York Tel. Co.*, 45 Misc.2d, 229, 234, 256 N.Y.S.2d 49, 54 (Sup. Ct. Suffolk Co. 1964). Dis-

con's Public Service Law claim must be dismissed because the Complaint fails to allege or show any disobedience of a positive command or injunction of the Public Service Commission.

Discon alleges that NYNEX caused New York Telephone not to file the MECo supply contract with the Public Service Commission as allegedly required under N.Y. Pub. Serv. Law § 110(3). Complaint ¶ 167. This allegedly caused New York Telephone to make payments to MECo in excess of reasonable costs. Section 110(3), however, "was not written to cover all contracts between a utility and its affiliates but only specific categories of contracts . . . ." *New York Tel. Co. v. Public Serv. Com.*, 72 N.Y.2d 419, 426, 534 N.Y.S.2d 136, 139 (1988). In *General Tel. Co. v. Lundy*, 17 N.Y.2d 373, 378-79, 271 N.Y.S.2d 216, 221 (1966), the New York Court of Appeals determined that supply contracts between telephone companies and their affiliates are not one of the categories covered by § 110(3). Thus, the failure to file the supply contract between New York Telephone and MECo was not a violation of § 110(3) and does not create a private cause of action under § 93.

Discon also alleges that NYNEX and MECo have caused New York Telephone to grant an unreasonable preference to MECo in New York Telephone's procurement of network services in violation of N. Y. Pub. Serv. Law § 91(3). Complaint ¶ 168.[6] However, the anti-discrimination provisions of the Public Service Law only apply to discrimination in the sale of the utilities' regulated services. *See In re City Ice & Fuel Co.*, 260 A.D. 537, 542, 23 N.Y.S.2d 376, 381 (3d Dept. 1940). Here, Discon is trying to apply § 91(3) to the purchase by a utility of another firm's unregulated services. Thus, Discon fails to state a claim under § 91(3).

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[6] Paragraph 168 alleges a violation of N.Y. Pub. Serv. Law § 90(3), but it appears that Discon meant to refer to § 91(3).

G. *Prima Facie Tort Claim*

The Eleventh Count of the Complaint purports to allege that defendants committed a *prima facie* tort. *Prima facie* tort is the infliction of harm, with a singular intention to injure the plaintiff, resulting in special damages, without excuse or justification, by an act or series of acts that would otherwise be lawful. *See Lincoln First Bank of Rochester v. Siegel*, 60 A.D.2d 270, 279, 400 N.Y.S.2d 627, 633 (4th Dept. 1977); *Wegman v. Dairylea Cooperative, Inc.*, 50 A.D.2d 108, 114-15, 376 N.Y.S.2d 728, 735-36 (4th Dept. 1975), *appeal dismissed*, 38 N.Y.2d 918, 382 N.Y.S.2d 979 (1976).

In this case, the Court finds that the Complaint fails to adequately allege facts showing that defendants acted with the sole intention of harming Discon. The Complaint is replete with statements and suggestions that defendants acted with the motive of increasing profits or gaining a business advantage. *See* Complaint ¶¶ 35, 55, 86, 144. "When there are other motives, such as profit, self-interest, or business advantage, there is no recovery under the doctrine of *prima facie* tort." *Marcella v. ARP Films, Inc.*, 778 F.2d 112, 119 (2d Cir. 1985); *see also Roberts v. Pollack*, 92 A.D.2d 440, 447, 461 N.Y.S.2d 272, 276 (1st Dept. 1983); *Squire Records, Inc. v. Vanguard Recording Society, Inc.*, 25 A.D.2d 190, 192, 268 N.Y.S.2d 251, 254 (1st Dept. 1966), *aff'd*, 19 N.Y.2d 797, 279 N.Y.S.2d 737 (1967).

H. *Third-Party Beneficiary Claim*

The Twelfth Count of the Complaint purports to allege a third-party beneficiary claim under a "supply contract" between MECo and New York Telephone. Under New York law, third-parties may enforce contracts only when they are "intended" rather than "incidental" beneficiaries. *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 44, 495 N.Y.S.2d 1, 5 (1985); *World Trade Knitting Mills, Inc. v. Lidon Knitting Mills, Inc.*,

154 A.D.2d 99, 103, 551 N.Y.S.2d 930, 933-34 (2d Dept. 1990). "Essential to status as an intended beneficiary . . . is either that 'performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary' or that 'the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.'" *Fourth Ocean Putnam Corp.*, 66 N.Y.2d at 44, 495 N.Y.S.2d at 5 (quoting Restatement (Second) of Contracts § 302 (1981)).

Discon's Complaint fails to allege any facts consistent with a claim that Discon was an intended beneficiary of the contract between MECo and New York Telephone. The Complaint does not allege that New York Telephone owed Discon a money obligation that performance of the MECo-New York Telephone would satisfy. Nor does it allege that New York Telephone and MECo intended the contract to benefit Discon. All the Complaint alleges is that the contract required MECo to supply New York Telephone with a price list for the goods and services that it sells to New York Telephone, and to sell those goods and services to New York Telephone at reasonable prices. Complaint ¶ 177. The provision on price lists does not indicate in any way that Discon was an intended beneficiary. Thus, the third-party beneficiary claim must be dismissed. *See County of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52, 63 (2d Cir. 1984); *Ahn v. Rooney, Pace Inc.*, 624 F. Supp. 368, 371 (S.D.N.Y. 1985); *New York State Energy Research and Development Auth. v. Nuclear Fuel Serv., Inc.*, 561 F. Supp. 954, 979 (W.D.N.Y. 1983).

I. *Breach of Contract Claim* [7]

The Fourteenth Count of the Complaint purports to allege that defendants are liable for breach of the contract

[7] The parties have stipulated to dismissal of the Thirteenth Count of the Complaint entitled "Third Party Beneficiary (Consent Decree)."

specified in paragraph 68 of the Complaint that allowed Discon to provide network services to New York Telephone through MECo. Complaint ¶¶ 191-193. More specifically, Discon alleges that:

> The contract described in paragraph 68 implies a covenant of fair dealing, including implied terms (1) that MECo will not arbitrarily disqualify or retaliate against Discon; (2) that MECo would not rig bids or otherwise discriminate against Discon; and (3) that MECo would not force Discon to perform services outside awarded contracts without compensation.

Complaint ¶ 192.

The Complaint does not specify the purported contract subject, the period it was in effect, or even who the parties were who entered into it. Discon has not quoted any provision of the purported contract and has not annexed it to the Complaint. In fact, it is not even pleaded that any specific provision of the contract was breached.

While Discon alleges that there was an implied covenant of fair dealing, it is not specifically alleged that such a covenant was breached. "In every contract there is an implied covenant of good faith and fair dealing which precludes each party from engaging in conduct that will deprive the other of the benefits of their agreement." *Filner v. Shapiro*, 633 F.2d 139, 143 (2d Cir. 1980). Discon, however, fails to allege that the conduct it complains of has deprived it of any of the benefits to which it was entitled under the terms of the purported contract.

In sum, allegations are lacking both as to the essential terms of the contract and as to the nature of its breach. Thus, the breach of contract claim must be dismissed. *Stephens v. Apostol*, 17 A.D.2d 982, 982, 234 N.Y.S.2d 337, 338 (2d Dept. 1962).

J. *Defamation Claim*

The Fifteenth Count of the Complaint purports to allege that defendants are liable for injury to Discon's reputation because of an allegedly false statement that was made to the Public Service Commission that "Discon did not intend to receive payment for the loan requested by a MECo employee." Complaint ¶ 195. The Complaint alleges that the statement was made by New York Telephone after an investigation by New York Telephone Security in 1985. Complaint ¶ 75. This claim must be dismissed as time-barred. Defamation is subject to a one-year statute of limitations set forth in N.Y. Civ. Prac. L & R. § 215(3). *See Wanamaker v. Columbian Rope Co.*, 713 F. Supp. 533, 545 (N.D.N.Y. 1989). This action was not commenced within one year of the alleged defamatory statement.

In its memorandum submitted in opposition to defendants' motion to dismiss, Discon states that it believes "that [New York Telephone] published the libel repeatedly, particularly during the [Public Service Commission's] 1989 audit of central office removals" and therefore the one-year statute of limitations does not bar the defamation claim. *See* Plaintiff's Opposition to Defendants' Motion to Dismiss at 34. The Complaint, however, fails to allege any publication of the defamatory statement besides that alleged to have occurred in 1985.

K. *Civil Conspiracy Claim*

The tort of civil conspiracy in New York is a derivative claim. *See Dean R. Pelton Co. v. Moundsville Shopping Plaza, Inc.*, 173 A.D.2d 201, 569 N.Y.S.2d 424 (1st Dept. 1991). Thus, although a party may not be liable for conspiracy alone, one may be liable for conspiracy to commit another intentional tort. *See Kashi v. Gratsos*, 790 F.2d 1050, 1055 (2d Cir. 1986). Since all of Discon's other claims have been dismissed, its conspiracy claim necessarily fails.

L. *Failure to Comply with Fed. R. Civ. P. 8(a)*

While defendants did not move for dismissal of the Complaint under Fed. R. Civ. P. 8(a), the Court notes that the Complaint should also be dismissed because it fails to comply with that Rule's requirement that "[a] pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . ." The Complaint lacks any coherent organization and is unduly confusing and lengthy. At the beginning of the Complaint, Discon throws together over one hundred paragraphs of factual allegations. Then, in the remainder of the Complaint, it sets out, in conclusory fashion, its claims. However, none of the factual allegations contained in the beginning of the Complaint are matched to any specific claims. Each claim simply incorporates by reference all the preceding paragraphs. It is not the duty of the defendants or this Court to sift through the Complaint and guess which factual allegations support which claims. Rule 8(a) places the burden squarely upon the plaintiff to clearly and succinctly state its claims. If Discon interposes an amended complaint it must comply with Rule 8(a) or face dismissal of the action and possible sanctions.

II. *Motion for Sanctions*

Defendants have moved for sanctions pursuant to Fed. R. Civ. P. 11. They argue that sanctions are warranted because the complaint is not well-grounded in fact, law, or a reasonable argument for the extension of existing law. The Court denies the motion, without prejudice. If Discon files an amended complaint and defendants determine that Rule 11 sanctions are warranted, they may again move for such sanctions.

CONCLUSION

For the reasons stated, defendants' motion to dismiss the Complaint for failure to state a claim is granted, without prejudice. Discon is granted leave to file an amended complaint by July 31, 1992. If the amended complaint includes a RICO claim, it must be accompanied by a RICO Case Statement pursuant to the Court's January 22, 1991 Standing Order. If an amended complaint is not filed by July 31, 1992, this action will be dismissed with prejudice. Defendants' motion for sanctions is denied, without prejudice.

It is so ordered.

/s/ Richard J. Arcara
HONORABLE RICHARD J. ARCARA
United States District Judge

Dated: June 23, 1992

Amended Complaint, dated July 31, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

Civ. 90-0546A

DISCON, INCORPORATED,
Plaintiff
v.

NYNEX CORPORATION, NYNEX MATERIEL ENTERPRISES, NEW YORK TELEPHONE, ROBERT J. ECKENRODE, BERNARD O'REILLY,
Defendants

JURY TRIAL DEMANDED

FIRST AMENDED COMPLAINT

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

Civ. 90-0546A

DISCON, INCORPORATED,
Plaintiff

v.

NYNEX CORPORATION,
NYNEX MATERIEL ENTERPRISES,
NEW YORK TELEPHONE,
ROBERT J. ECKENRODE, BERNARD O'REILLY,
Defendants

JURY TRIAL DEMANDED

Plaintiff, Discon, Incorporated ("Discon"), alleges as follows:

I. NATURE OF THIS ACTION

1. This action responds to a pattern of bidrigging, extortion, and anti-competitive practices by which NYNEX caused New York Telephone ("NYT") to divert regulated funds to unregulated NYNEX affiliates, including NYNEX Materiel Enterprises ("MECo"). Acting in concert with AT&T, NYNEX also restrained trade and monopolized the market for removal services, in which Discon operated.

2. *Monopolization* (Counts One through Three). Prior to divestiture, AT&T extended monopoly power derived from the local telephone monopoly of NYT into markets for the supply of equipment and services used by telephone companies. This violated Section 2 of the Sherman Act, 15 U.S.C. § 2. For example, Western Electric, a subsidiary of AT&T, removed central office equip-

ment that was obsolete. After divestiture, NYNEX, through MECo and NYT, and AT&T, through AT&T Technologies ("Technologies") and AT&T Communications ("AT&T-C"), combined and conspired to perpetuate the monopolization of the market for removal services. NYNEX and AT&T (the antitrust combination) controlled both the supply and demand sides of this market. NYT and AT&T-C continued to be the only major purchasers of removal services in New York State. MECo and Technologies collectively refused to deal with low-cost suppliers, such as Discon, and took concerted action to drive Discon from the market. MECo and AT&T maintained an artificially high price for removal services provided to NYT. The combination divided monopoly profits through a system of markups and rebates. Through NYT and AT&T-C, the horizontal combination passed on the added costs by increasing regulated telephone rates. Their conspiracy also included causing false claims regarding Discon to be made to the New York Public Service Commission ("PSC"). The conspiracy to monopolize, the attempt to monopolize, and the successful monopolization of the market for removal services injured Discon by driving it out of business.

3. *Restraint of Trade* (Count Four). The antitrust combination included concerted action between MECo and Technologies to restrain trade in the market for removal services and other products and services purchased by telephone companies, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Despite the prohibition on procurement discrimination in the AT&T consent decree, NYNEX required NYT to buy only through MECo, which in turn awarded contracts to AT&T on a preferential or exclusive basis. MECo secretly marked Technologies' price up further (by as much as 42 percent) before billing NYT. Acting in concert with MECo, AT&T agreed not to deal directly with NYT, not to disclose its actual prices to NYT or to regulators, and to provide

rebates to MECo. MECo threatened to retaliate, and did retaliate, against suppliers that disclosed markups to NYT and offered to compete with MECo. These anticompetitive activities injured Discon, as a low-cost supplier of removal services and as a consumer of regulated telephone services.

4. *Conduct of the Affairs of an Enterprise Through a Pattern of Racketeering Activity* (Counts Five and Seven). Defendants conducted and conspired to conduct the affairs of NYNEX (the conduct enterprise) through a pattern of racketeering activity in support of schemes to defraud ratepayers of NYT, in violation of 18 U.S.C. § 1962(c). Each defendant agreed to participate in more than one predicate act of racketeering, which included acts of mail fraud, wire fraud, fraud in the sale of securities, obstruction of justice, obstruction of a criminal investigation, extortion, interstate transportation of stolen goods, and interstate travel in aid of racketeering.

5. *Control of an Enterprise Through a Pattern of Racketeering Activity* (Counts Six and Seven). Defendants maintained and conspired to maintain control of NYT (the controlled enterprise) through a pattern of racketeering, in violation of 18 U.S.C. § 1962(b). Defendants understood that regulators, if they discovered the scheme to defraud NYT ratepayers, would restrict or eliminate defendants' control of NYT. To maintain control of NYT, defendants engaged in acts of extortion wire fraud, mail fraud, obstruction of justice, and obstruction of a criminal investigation, as part of a scheme the purpose of which was to conceal the fraud on NYT's ratepayers from state and federal regulators.

6. Discon also seeks relief under the General Business Law and the common law of New York (Counts Eight through Thirteen).

II. JURISDICTION

7. This case arises under the federal antitrust laws, Title 9 of the Organized Crime Control Act ("RICO"), Article 22 of the New York General Business Law ("Donnelly Act"), and the common law.

8. 15 U.S.C. § 15 (Section 4 of the Clayton Act) confers jurisdiction over Counts One through Four.

9. 18 U.S.C. § 1964 confers jurisdiction over Counts Five through Seven.

10. This Court has pendant jurisdiction over Counts Eight through Thirteen.

III. VENUE

11. Each of the defendants does business in the Western District of New York.

12. 15 U.S.C. 22, 18 U.S.C. § 1965, and 28 U.S.C. § 1391 provide venue in the Western District of New York.

IV. PARTIES

13. Plaintiff Discon is a corporation organized under the laws of the State of New York. Discon's primary business is the provision of "removal services," which constitutes the salvage and disposal of obsolete telephone central office equipment. At times relevant to this complaint, Discon was a customer of NYT, from which Discon obtained telephone services under tariff.

14. Defendant NYNEX Corporation ("NYNEX Corp.") is a holding company incorporated under the laws of Delaware. Its principal place of business is New York City. NYNEX's principal business is the provision of exchange service and exchange access, which it conducts through regulated subsidiaries NYT and New England Telephone & Telegraph ("NET"). NYNEX Corp. has violated the antitrust laws through various subsidiaries, collectively referred to as "NYNEX."

15. Defendant NYT is a New York corporation, which provides exchange telecommunications and exchange access in New York State and adjacent areas of Connecticut. At times relevant to this Complaint, the remaining defendants controlled NYT (the controlled enterprise) through a pattern of racketeering.

16. Defendant MECo was incorporated under the laws of Delaware. NYNEX created MECo as a separate, profit-making venture responsible to the parent holding company. MECo's primary business function is procuring goods and services for NYT and NET, and for NYNEX Service Company ("NSC"), a subsidiary of the regulated telephone companies. In March 1990, the PSC forced NYNEX to transfer the activities of MECo to a wholly-owned subsidiary of NYT and NET. In April 1992, in response to disclosures that Discon and other parties made, the PSC prohibited most transactions between NYT and unregulated affiliates.

17. Defendant Robert J. Eckenrode is a citizen of Connecticut. From 1983 (when he was still an employee of AT&T) until 1986, Eckenrode served as vice president in charge of planning the structure of NYNEX. From 1986 to 1988, he was executive vice president of NYNEX Corp. and oversaw MECo and other unregulated activities. Eckenrode designed the "Eckenrode Synergy Plan," which required NYT officials to divert regulated funds to subsidize unregulated NYNEX affiliates. Eckenrode concealed information regarding the ratepayer frauds and unorthodox business practices at MECo from regulators. In 1988, NYNEX Corp. named him vice chairman. Eckenrode signed a fraudulent report to the Securities and Exchange Commission ("SEC") in March 1990.

18. Defendant Bernard O'Reilly is a citizen of New Jersey. O'Reilly was a district manager of MECo. Through acts of extortion, O'Reilly attempted to induce Discon affirmatively to misrepresent to NYT the terms of contracts between Discon and MECo, to perform work

for MECo without compensation, and to defraud purchasers of scrap that MECo acquired from NYT. O'Reilly transported scrap taken by fraud from NYT across state lines.

19. The NYNEX Family of Companies ("NYNEX") is an enterprise comprised of an association in fact among NYNEX Corp., its subsidiaries (including NYT and MECo), their officers (including Eckenrode), employees (including O'Reilly) and their accountants, attorneys, and other agents. At times relevant to this Complaint, defendants and other persons conducted the affairs of NYNEX (the conduct enterprise) through a pattern of racketeering.

V. BACKGROUND

20. In the face of litigation under the Sherman Act, NYNEX made specific undertakings not to discriminate against unaffiliated suppliers. Despite these commitments, NYNEX discriminated against Discon and monopolized markets for removal services.

21. Until January 1, 1984, AT&T owned the Bell operating companies ("BOCs"), including NYT and NET, as well as Technologies, which manufactured and procured equipment for the BOCs. BOCs obtained a small amount of equipment from unaffiliated suppliers, collectively known as the "general trade." A civil antitrust action, brought by the United States on November 20, 1974, charged that AT&T monopolized various markets in violation of Section 2 of the Sherman Act. The principal claim was that AT&T used the BOCs' natural monopoly over exchange service to discriminate against unaffiliated suppliers and thereby to extend its monopoly power into potentially competitive markets, including the markets for network equipment and removal services. On September 11, 1981, the United States District Court for the District of Columbia found that AT&T "has violated the antitrust laws in a number of ways over a lengthy period of time." *United States v. AT&T*, 524 F. Supp. 1336, 1381 (D.D.C.

1981). Specifically, the Court concluded that "procurement decisions within the Bell System tend to create a predisposition within [BOC] managers in favor of Western profits and against the general trade competition." *Id.* at 1373. On August 11, 1982, this District Court found that "there was proof that AT&T used its control over the local Operating Companies to force them to buy products from Western Electric even though other equipment manufacturers produced better products or products of identical quality at lower prices." 552 F. Supp. 131, 163 (D.D.C. 1982). On August 24, 1982, AT&T entered a consent decree ("consent decree") to settle this litigation. The consent decree required that AT&T divest the BOCs. On January 1, 1984, AT&T transferred two telephone companies (NYT and NET) to NYNEX Corp.

22. The consent decree imposed obligations on NYNEX and other divested BOCs. The consent decree required the BOCs to provide equal access to interexchange carriers, which resulted in a large number of removals and installations of exchange central offices. It prohibited the BOCs from discriminating between AT&T and others in the procurement of products and services, and required them to submit procurement procedures to Justice. The AT&T consent decree also prohibits a BOC from discriminating in favor of its own affiliates.

23. Despite divestiture, NYT remains the dominant exchange carrier in New York State. Except for Rochester, Jamestown and Middletown, NYT serves every town and city in the State whose population exceeds 25,000. As of December 31, 1989, NYT served 89.9 percent of all network access lines in the State. In these areas, NYT supplies more than 95 percent of exchange service and exchange access. NYT continues to have market power and the ability to extend that power into markets for the supply of products and services that telephone companies require.

24. AT&T created MECo prior to divestiture and caused NYT and MECo to enter into an agreement dated December 30, 1983 ("MECo Supply Contract") that purported to make "available to [NYT] a procurement entity which is established, organized, staffed, and equipped to purchase products and . . . services . . . so as to achieve economies and other increased efficiencies." The agreement required MECo to maintain reasonable prices and to include them "insofar as practicable [in] published price lists." NYT specifically intended the maintenance of "published price lists" to benefit third-party vendors, such as Discon, by encouraging them to offer services to NYT through MECo where they could undercut existing prices, many of which AT&T had set when Western Electric was the monopoly supplier.

25. On January 1, 1984, AT&T transferred control of MECo to NYNEX Corp. AT&T failed to comply with the consent decree, which required that MECo receive "sufficient facilities, personnel [and] systems . . . to perform independently of AT&T." MECo lacked the staffing and expertise to conduct effective procurement on a competitive and independent basis. It continued to collude with, cooperate with and depend upon AT&T and Technologies. Even after divestiture, MECo awarded Technologies contracts on a preferential basis, charging administered prices into NYT's ratebase and regulated expense accounts.

VI. MONOPOLIZATION OF REMOVAL SERVICES MARKET

A. Extension of Market Power Into Removal Services Market

26. Technologies is the dominant supplier of removal services in New York State. Prior to divestiture, Western Electric, Technologies' predecessor, performed virtually all removals at NYT's exchange central offices. Technologies continues to be the exclusive supplier of removal

services to AT&T-C, which operates an interexchange network in the State. Acting in concert with MECo, Technologies has perpetuated its monopoly over the supply of removal services to NYT.

27. After divestiture, most BOCs other than NYT and NET decided to rely on unaffiliated contractors for removals (or use employees whose wages are charged directly into regulated accounts). Of more than 400 removals, NYT only did four, and only administered bids for approximately forty. NYT contracted with MECo for the remainder. The purpose of this arrangement was to allow NYT to charge excess costs into regulated accounts and to generate profits at MECo, which was not subject to effective regulation.

28. The consent decree required NYT to provide equal access to inter-exchange service. This forced NYT to remove substantial parts of most central offices and to install new electronic switches. NYT's network service requirements have been approximately $50 million per year since divestiture.

29. As a result, NYT and AT&T-C are the dominant purchasers of removal services in the New York State area. At times relevant to this complaint, MECo and Technologies were also the dominant suppliers of removal services in the New York State area. NYNEX and AT&T created a horizontal combination whose object was to exclude new entrants from the monopolized market for removal services, to maintain high price levels in this market, and to recover these administered prices through regulated rates for telephone service.

30. The PSC and FCC have both found that MECo procured on a noncompetitive basis and increased costs subject to regulation. As found by the PSC staff, "MECo's early central office equipment removal jobs demonstrated poor service to NYT and highlighted MECo's lack of experience. . . . MECo's management actually did lead to inconsistent and unfair treatment of vendors." The PSC

staff concluded that MECo's improper awards of removal contracts cost NYT at least $20 million from 1984 to 1988. As found by the FCC, "MECo overcharged its regulated affiliates on sales of products and services, and the regulated telephone companies in turn, passed on excessive costs to ratepayers by improperly recording the overcharges 'above the line' as regulated costs." *New York Telephone* ("*NYT*"), FCC 90-57, para. 16. "Notwithstanding inconsistent statements in [materials filed with the FCC], markups had a wide and inconsistent range with no discernible relationship to costs." *id.*, para. 18. At least until March 16, 1990, NYNEX used MECo to inflate the costs that NYT recovered under state and federal tariffs and to generate unregulated profits that MECo sent to NYNEX Corp. as dividends.

31. MECo and Technologies combined to set the price for removal services in New York State. MECo agreed to award Technologies most contracts on a non-competitive basis. MECo allowed Technologies to write job change orders (or "JIMs") to increase payments on NYT contracts in excess of the not-to-exceed price. In return for these concessions, Technologies agreed to serve only as a subcontractor to MECo on most contracts. This allowed MECo to mark up Technologies' prices. Acting in concert, Technologies and MECo used markups and rebates to divide monopoly profits derived from the sale of removal services to NYT at the inflated prices that they set.

B. Exclusion of Discon

32. MECo used monopoly power unlawfully extended into the market for removal services to exclude Discon from competition.

33. NYNEX and AT&T combined to exclude Discon from the market for removal services. Circumstances exclude the possibility that NYNEX affiliates acted unilaterally in deciding that NYT would not obtain removal services from Discon, but would obtain removal services from Technologies. These facts include:

(a) AT&T conspired with Robert McGee, a Buffalo subcontractor, and NYNEX personnel to provide false information that would supply a basis to defend the decertification of Discon to state and federal regulators. (*see* paragraph 47)

(b) The division of monopoly profits derived from sales of removal services to NYT was part of a package of reciprocal arrangements between NYNEX and AT&T including the secret year-end rebate, the high technologies contract, and the plug-in contract described in paragraphs 61 and 63 below.

(c) NYT and AT&T agreed to assign to Technologies supervisory and quality control responsibilities relating to contracts awarded to Discon.

(d) NYNEX and AT&T agreed that Technologies would use preferential billing systems and could use job change orders to receive payments in excess of Technologies' fixed-price bid.

(e) Prior to divestiture, AT&T placed NYNEX in control of executives, including Lawrence Friedman, head of MECo purchasing, and Eckenrode, that were committed to perpetuating de facto integration of AT&T and NYNEX and continuing the anticompetitive practices that gave rise to the divestiture.

(f) In violation of the consent decree, AT&T failed to transfer to MECo the staffing and expertise necessary to conduct effective procurement on a competitive and independent basis.

(g) Agents of AT&T (and of a rigging company that worked with AT&T on removals projects) entertained NYNEX procurement personnel at meetings in Florida. MECo, through Friedman, arranged these meetings and invited the participants. MECo favored

vendors, including AT&T and the rigging company, that attended these meetings.

34. NYNEX and AT&T agreed that MECo would reassign removal contracts, including those at Otego, Hobart and Nichols, to Technologies even though NYT had already awarded the jobs to Discon at a lower price. The PSC staff found fourteen additional instances where Technologies received removal contracts when it was not the lowest bidder.

35. In order to exclude Discon from the market, NYNEX and Technologies agreed that NYT would discriminate against Discon and in favor of AT&T by allowing Technologies access to its "725" prepaid billing system. This provided for payment one month in advance of work performed. Discon's payments, by contrast, were irregular and delayed by as much as a year after performance.

36. In order to exclude Discon from the market, NYNEX and AT&T agreed to assign to Technologies supervisory and quality control responsibilities relating to contracts awarded to Discon.

37. MECo further discriminated against Discon and in favor of AT&T by refusing to provide written contracts or authorizations for three jobs, whose value exceeded a million dollars. Because this practice violated standard procurement procedures, O'Reilly demanded that Faltisco tell NYT personnel that Discon had received countersigned copies of its offers.

38. MECo forced Discon to accept obligations outside its contract, to forgo billing job changes and to dispose of scrap on non-economic terms. The purpose of these changes was to enhance MECo's profits and conceal losses caused by errors and irregularities in MECo's administration of contracts. These burdens discriminated against Discon and in favor of AT&T because O'Reilly did not impose similar requirements or make similar threats

against Technologies. O'Reilly threatened to retaliate against Discon and to place Discon out of business if it did not absorb the costs added by these changes.

39. Technologies used JIMs or charged extra hours on non-competitive jobs to build up a reserve to subsidize predatory pricing on jobs that were open to competitors. In connection with the removal of a 4A and tandem switch at the central office on Franklin Street in Buffalo, Technologies calculated a bid price of $1.7 million. In an attempt to undercut Discon, Technologies bid $998,000, which was below its actual costs.

40. On June 18, 1984, Discon submitted a bid to MECo for $574,000 for the Franklin Street removal and won the contract. Without the knowledge of Discon or of NYT managers, MECo marked this up by 45 percent to $832,000. MECo sent NYT documentation in which Technologies' actual bid had been covertly marked up by the same percentage.

41. On July 17, 1984, Discon performed an emergency re-use removal in Chappaqua at the request of NYT Engineering. NYT told Discon that they were unable to reach anyone at MECo in a timely manner. O'Reilly upbraided Discon for dealing directly with NYT and particularly for disclosing the price of the removal, which threatened MECo's future ability to pass on undisclosed markups.

42. In mid-August 1984, NYT asked Discon to perform an emergency cable-mining job at Franklin Street, Buffalo. Discon was unable to reach anyone at MECo to discuss the request. Discon agreed to do the job for $1,000, which was far below the rates that MECo had been charging NYT for similar work performed by Discon. O'Reilly again upbraided Discon for working directly for NYT. He stated that NYNEX policy prohibited vendors from disclosing their prices to NYT.

43. In late October 1984, a NYT engineer told Faltisco that Technologies was complaining that Discon was awarded Franklin Street only because MECo had not marked up the Discon price as much as the Technologies price. As a result, Faltisco met with John Jacoy, a NYT manager, and disclosed Discon's actual price. At this time, Jacoy learned that MECo had marked up Discon's price by 45 percent. Jacoy later found that there were markups of up to 600 percent on other jobs that MECo had assigned to Discon. In early November 1984, Jacoy asked Discon to perform another emergency removal. Discon agreed to do the job for $20 per hour. This was substantially below Technologies' rate.

44. During November 1984, NYT requested that Discon submit a bid for a removal in Williamsville. Two days before the bid was due, O'Reilly caused Robert Zirkelbach of MECo to fly to Buffalo and to demand that Discon notify NYT that it would not bid. O'Reilly told Faltisco that unless he signed the letter delivered by Zirkelbach, MECo would put Discon "out of business." The letter stated that Discon was only "prepared to accept orders [placed through MECo] pursuant to our existing contract agreement." Zirkelbach also delivered a contract backdated to November 1, 1984, which allowed Discon to provide removal services to NYT through MECo. Zirkelbach represented that Discon should anticipate that MECo would ask it to bid on all network service projects that MECo administered. He told Faltisco that he had better prepare for Discon to "grow like hell."

45. A NYT manager telephoned Faltisco on the due date and told him that unless Discon bid on Williamsville and agreed to work directly with NYT, he would see to it that Discon never worked for NYT in the mid-Hudson region. Subsequently, both NYT and MECo excluded Discon from all requests for proposals in the mid-Hudson region.

46. Technologies agreed to do the Williamsville removal for the firm price of about $20,000. Technologies failed to complete the removal, even after submitting additional billings (JIMs) for $40,000. NYT made these additional payments over Jacoy's objection.

47. On November 27, 1984, NYT substantially expanded Discon's role in cable-mining at Franklin Street. The following day, NYNEX and Technology caused Robert McGee, a former partner of Faltisco, to send a letter to NYNEX Corp. making false statements regarding Discon. Among the false statements were (1) that Discon was not incorporated, (2) that Lepkowski of NYT had favored Discon by guaranteeing a contract between Discon and Rupp Rental, (3) that Discon damaged cables and that NYT personnel repaired them at no cost, (4) that NYT provided training and dismantling assistance to Discon, (5) that Discon had committed "theft" of precious metals during the job. Although McGee described himself as a competitor of Discon, he submitted no bids except jointly with Technologies. MECo, through agents of NYT Security who knew the allegations to be false, subsequently used the letter as an essential part of the scheme to defraud NYT ratepayers by excluding Discon as a supplier. To reward MeGee, AT&T subcontracted McGee on removal contracts.

48. Effective January 1, 1985, Discon and MECo entered a general supply contract for a term of three years. The contract provided that MECo "shall pay [Discon] for the performance of services under this Agreement . . . within a reasonable time." The contract included an oral term that Discon would be allowed to bid on all removal service contracts that MECo managed. Exhibit 1 to this complaint is a true copy of the written portion of this contract. MECo never provided the written notice necessary to terminate this contract.

49. In March 29, 1985, O'Reilly falsely told Faltisco by telephone that NYT had closed billing for Franklin

Street, when in fact NYT had instructed O'Reilly to accept billing for extra work that Discon had performed. Discon did not receive any portion of more than $120,000 in invoices prior to December 1989.

50. On June 19, 1985, two employees of NYT Security visited Faltisco. They threatened to make an unfavorable report about Discon unless Faltisco made a statement that Zirkelbach had extorted money from him. Faltisco declined to make the statement because it was untrue. On July 9, 1985, MECo demanded and received Zirkelbach's resignation. In an effort during 1989 to defame and discredit Discon, NYT falsely told the PSC that Discon had made Zirkelbach a loan that Discon did not expect Zirkelbach to repay.

51. In July 1985, Peter Haynes replaced Paul O'Brien as president of MECo. In response to continued objections by NYT, Haynes agreed to discontinue the use of the extreme markups that MECo had used to increase the bids by low-cost vendors to the historic Western Electric price. (The mark up schedules had allowed MECo to inflate Discon's bids by as much as 1004 percent on certain removals.) MECo continued to mark up removals by about 30 percent. This change meant that, after mid-1985, MECo increased its profits by using high-cost vendors (such as Technologies), rather than Discon.

52. During the second half of 1985, Discon performed numerous removal jobs directly for NYT in the Upstate area. During the first half of 1986, Discon performed about fifteen removals for NYT. In most of these cases, Discon received payment within two months. In March 1986, NYT invited Discon to bid on the removal of equipment from its Cortland central office. Discon delivered a sealed, firm price bid the day before the response date. A week later, NYT returned the bid unopened stating that NYT had decided to have MECo handle the bidding.

53. In March 1986, Discon hired Zirkelbach to help on proposed work for Rochester Telephone Company and BellSouth Services, Inc. On May 29, 1986, an employee of NYT Security asked Faltisco if he had hired Zirkelbach and then told Faltisco that he was instructed to state that Discon would not be allowed to perform removals for eighteen months to two years. The following day, the employee stated that he was writing a strong recommendation that Discon be restored to the approved vendor list. The employee also agreed to supply a written copy of NYT's procurement policies.

54. On June 10, 1986, another employee of NYT Security again told Faltisco that he would not be allowed to work for MECo or NYT for a year to eighteen months. No written reason was given. NYT personnel refused to meet with Faltisco to explain the action.

55. Since at least June 1986, the improper decertification of Discon as an approved vendor for MECo or NYT and the refusal to allow Discon to submit bids has restrained Discon from competing in markets for removal services and injured it in its business.

56. On September 8, 1986, a MECo employee told Faltisco that he would not be allowed to work for MECo or NYT until he signed a release and returned evidence of the illegal markups and of incidents of discrimination in favor of Technologies.

57. Persistent efforts by Jacoy and his superior to regain control over removals contracting were not successful. William C. Ferguson, then president of NYT and now chairman of NYNEX Corp., suppressed NYT's efforts to reduce its costs. He ordered NYT personnel to conduct all purchasing through MECo, unless they could fully document the grounds for an "exception" and obtain high-level approval. NYNEX Corp., MECo and Eckenrode caused NYT to publish Methodsgram issue no. 182 in October 1984, which directed NYT to allow MECo to

act as general contractor on all removals contracts. Ferguson reaffirmed this policy in February 1986 and gave complete control over removals to MECo in the Upstate area.

58. It was not until May 1988, after an audit by the PSC, top management directed NYT to contract directly with vendors in all removals. By this time, Discon had laid off all its employees and was no longer doing business.

VII. CONCERTED ACTION BETWEEN NYNEX AND AT&T TO RESTRAIN TRADE IN SERVICE AND EQUIPMENT MARKETS

59. Even in markets (such as personal computers and circuit boards) that they could not monopolize, NYNEX and AT&T combined to restrain trade by causing NYT to buy AT&T products and services on a preferential or exclusive basis, to pay AT&T (through MECo) inflated prices for these products and services, and to recover the resulting excess costs from NYT's regulated ratepayers. In order to divide the excess payments made by NYT's ratepayers, NYNEX and AT&T entered an arrangement whereby (a) MECo would mark up the price of AT&T products and services and prevent NYT from buying low-cost alternatives, (b) MECo would pay excess prices to AT&T for products and services to be included in NYT's ratebase, and (c) AT&T would provide year-end rebates to MECo.

60. Employees of NYT who concluded that there was a cost advantage to purchasing from a source other than MECo were required to submit full documentation for review by superiors. Such employees were accused of not promoting "corporate synergy." They suffered adverse personnel evaluations. As found by the FCC, "NYNEX's corporate purchasing policy, which required [NYT and NET] to purchase certain product lines and services through MECo in most instances, contributed to and reinforced MECo's pricing strategy." *NYT*, para. 18.

61. In December 1984, MECo, through Friedman, and Technologies signed the "high technologies" contract no. X-00105-D. MECo agrees that NYT and NET will buy assured quantities of regulated switching and transmission equipment over a three-year period. AT&T agreed to deal with NYT only through MECo and to give MECo secret rebates directly related to the amount of purchases NYT and NET made.

62. From 1987 to 1990, MECo bought computers from the NYNEX Business Center of NYNEX Business Information Systems ("BISC"), another unregulated NYNEX subsidiary, for resale to NYT. MECo discriminated against unaffiliated suppliers by providing BISC information regarding competitors' offers and allowing it to meet the price. On additional occasions, MECo paid BISC in excess of the price at which computers were available from unaffiliated suppliers.

63. MECo also entered into a contract with AT&T to manage the decline in NYT's purchases of AT&T plug-in circuit boards. Because alternative suppliers produced lower priced circuit boards that were equal or superior in quality, the contract required NYNEX to discriminate in favor of AT&T. When a MECo employee complained that this undertaking violated the consent decree, AT&T threatened him with retaliation. Acting in concert with AT&T, MECo, through Friedman, did retaliate against the employee. Friedman fraudulently altered the employee's personnel records. In January 1988, NYNEX Corp. and MECo caused payments to be made to this employee in settlement of a civil action. A condition of the settlement prohibited the former employee from disclosing allegations to any person, including criminal investigators.

VIII. THE SCHEMES TO DEFRAUD RATEPAYERS

64. The purpose and effect of the overcharges and exclusions of vendors described in paragraphs 32 through 58 was to defraud Discon and other ratepayers by causing

NYT to record overcharges as costs in its regulated accounts. The FCC and PSC relied on NYT's accounts and other regulatory disclosures in approving NYT's rates and practices, in failing to investigate these rates, and in allowing them to continue. By inflating NYT's regulated expense and capital accounts, these overcharges enabled NYT to charge rates for local telephone service and exchange access that exceeded the rates that it could maintain in the absence of the scheme to defraud.

A. MECo Overcharges

65. NYT, which the other defendants controlled, paid MECo overcharges in knowing violation of its obligations under the Public Service Law. From the middle of 1988, NYT began to use separate accounts to record its estimates of illegal overcharges by MECo. In December 1988, MECo agreed to a partial refund of $42.2 million relating to intrastate overcharges. This did not include any overcharges from 1984 through 1987.

66. The FCC determined that MECo's conduct from January 1, 1984 to January 1, 1988 was inconsistent with its rules, 47 C.F.R. 31.01-2(c) and tentatively concluded that NYT's purchase of goods and services from MECo at inflated prices constituted an unreasonable practice in violation of Section 201(b) of the Communications Act of 1934, 47 U.S.C. 201(b). NYT agreed to pay the largest fine in the history of the FCC and to make partial refunds and partial adjustments to its ratebase.

67. The FCC found that MECo had retained excess profits from the overcharges in an amount exceeding $118 million. NYT paid additional excess costs to MECo that MECo diverted to AT&T by paying Technologies more than the market price.

68. The transactions between MECo and BISC described in paragraph 62 allowed MECo to transfer excess profits to BISC in anticipation of the FCC audit. The FCC did not reach diverted profits or excess costs associated with MECo's inefficiency, its diversion of profits to BISC and other NYNEX affiliates, and its discrimination in favor of Technologies. As a result, the adjustments and refunds that the FCC ordered fail fully to correct the impact of the Eckenrode Synergy Plan on NYT ratepayers, even within the interstate jurisdiction. NYT ratepayers have not received refunds associated with these costs, nor has NYT's ratebase been adjusted to remove the resulting inflation of capital assets.

69. NYNEX Corp. and Eckenrode caused NYT to make more than $3 million in payments to an attorney (ostensibly for the defense of an action not related to NYT's regulated activities) and to record these payments in its regulated accounts. Upon disclosure of this fraudulent transfer, the PSC directed a refund of amounts known to have been diverted from intrastate regulated accounts. The FCC has not yet required the restitution of charges made to the interstate jurisdiction.

70. Ratebase adjustments and refunds that the PSC and FCC have required do not fully compensate Discon and other NYT ratepayers for the frauds that defendants committed through NYT from 1984 until 1990. The New York State Department of Law has petitioned for appellate review of the FCC's decision on the basis that the ratebase adjustments are so inadequate as to be arbitrary and capricious.

B. Bid-Rigging and Procurement Discrimination

71. NYNEX Corp., MECo and O'Reilly defrauded NYT ratepayers by rigging bids on removal projects, as described in paragraphs 31, 34, 37, 44, 52 and 54, and by causing the regulated accounts of NYT to bear the resulting excess costs.

72. NYNEX Corp., MECo, NYT, Eckenrode and O'Reilly also defrauded NYT ratepayers by procuring (a) removal services, (b) switching and transmission equipment, and (c) circuit boards from AT&T on a discrimina-

tory basis, even though NYNEX Corp. had represented to the Department of Justice and to the PSC that its procurement practices were competitive.

73. The scheme to defraud ratepayers included acts of racketeering associated with marking up and processing Discon's invoices. NYT personnel believed that MECo was acting as an agent, for which it had been paid a $9 million fee. When MECo marked up Discon's invoices, it fraudulently represented to NYT that the marked up cost was Discon's actual bid. As indicated below, NYNEX and MECo committed at least 80 acts of mail fraud and 90 acts of wire fraud. In addition, O'Reilly personally committed two acts of mail fraud on November 14, 1984.

Initial date	Description of mail fraud or wire fraud	No. of acts
15 June 1984	Discon mails Franklin Street bid of $574,000, which MECo marks up to $832,000	two mail fraud
25 June 1984	NYT mails MECo letter accepting Discon bid for Franklin St.	mail fraud
28 June 1984	(1) Discon mails invoice no. D84-101 to MECo, which logs the actual amount of $1100 and the mark up to $3089 (or 181 percent); (2) MECo wires to NYNEX Boston; (3) NYNEX Boston debits mark up price to NYT Albany by wire; (4) NYNEX Boston mails check to Discon; (5) NYNEX credits excess to MECo; (6) Discon deposits check, wires debit to Boston; (7) Discon bank mails check to NYNEX bank; (8) NYNEX bank mails to MECo. [In this table, NYNEX specifically includes NYNEX Corp.]	four wire fraud; four mail fraud
28 June 1984	(1) Discon mails invoice no. D84-102 to MECo, which logs actual invoice of $2550 and marks up to $6237 or 145 percent; (2) MECo wires to NYNEX Boston; (3) NYNEX Boston debits	four wire fraud; four mail fraud

Initial date	Description of mail fraud or wire fraud	No. of acts
	mark up price to NYT Albany by wire; (4) NYNEX Boston mails check to Discon; (5) NYNEX credits excess to MECo; (6) Discon deposits check, wires debit to Boston; (7) Discon bank mails check to NYNEX bank; (8) NYNEX bank mails to MECo	
2 July 1984	(1) Discon mails invoice no. D84-001 to MECo, which logs actual invoice of $50,000 and mark up to $72,500; (2) MECo wires to NYNEX Boston; (3) NYNEX Boston debits mark up price to NYT Albany by wire; (4) NYNEX Boston mails check to Discon; (5) NYNEX credits excess to MECo; (6) Discon deposits check, wires debit to Boston; (7) Discon bank mails check to NYNEX bank; (8) NYNEX bank mails to MECo	four wire fraud; four mail fraud
11 July 1984	(1) Discon mails invoice no. 84-107 to MECo, which logs actual invoice and marks it up 250 percent; (2) MECo wires to NYNEX Boston; (3) NYNEX Boston debits mark up price to NYT Albany by wire; (4) NYNEX Boston mails check to Discon; (5) NYNEX credits excess to MECo; (6) Discon deposits check, wires debit to Boston; (7) Discon bank mails check to NYNEX bank; (8) NYNEX bank mails to MECo	four wire fraud; four mail fraud
11 July 1984	(1) Discon mails invoice no. D84-108 to MECo, which logs actual cost and mark up; (2) MECo wires to NYNEX Boston; (3) NYNEX Boston debits mark up price to NYT Albany by wire; (4) NYNEX Boston mails check to Discon; (5) NYNEX credits excess to MECo; (6) Discon deposits check, wires debit to Boston; (7) Discon bank mails check to NYNEX bank; (8) NYNEX bank mails to MECo	four wire fraud; four mail fraud

Initial date	Description of mail fraud or wire fraud	No. of acts
17 July 1984	(1) Discon mails invoice no. D84-103 to MECo, which logs actual cost and mark up; (2) MECo wires to NYNEX Boston; (3) NYNEX Boston debits mark up price to NYT Albany by wire; (4) NYNEX Boston mails check to Discon; (5) NYNEX credits excess to MECo; (6) Discon deposits check, wires debit to Boston; (7) Discon bank mails check to NYNEX bank; (8) NYNEX bank mails to MECo	four wire fraud; four mail fraud
13 August 1984	(1) Discon mails invoice no. 84-002 to MECo, which logs actual cost and mark up; (2) MECo wires to NYNEX Boston; (3) NYNEX Boston debits mark up price to NYT Albany by wire; (4) NYNEX Boston mails check to Discon; (5) NYNEX credits excess to MECo; (6) Discon deposits check, wires debit to Boston; (7) Discon bank mails check to NYNEX bank; (8) NYNEX bank mails to MECo	four wire fraud; four mail fraud
31 August 1984	(1) Discon mails invoice no. D84-003 to MECo, which logs actual cost and mark up; (2) MECo wires to NYNEX Boston; (3) NYNEX Boston debits mark up price to NYT Albany by wire; (4) NYNEX Boston mails check to Discon; (5) NYNEX credits excess to MECo; (6) Discon deposits check, wires debit to Boston; (7) Discon bank mails check to NYNEX bank; (8) NYNEX bank mails to MECo	four wire fraud; four mail fraud
14 September 1984	(1) Discon mails invoice no. D84-004 to MECo, which logs actual cost and mark up; (2) MECo wires to NYNEX Boston; (3) NYNEX Boston debits mark up price to NYT Albany by wire; (4) NYNEX Boston mails check to Discon; (5) NYNEX credits excess to MECo; (6) Discon deposits check,	four wire fraud; four mail fraud

Initial date	Description of mail fraud or wire fraud	No. of acts
	wires debit to Boston; (7) Discon bank mails check to NYNEX bank; (8) NYNEX bank mails to MECo	
22 September 1984	(1) Discon mails invoice no. D84-005 to MECo, which logs actual cost and mark up; (2) MECo wires to NYNEX Boston; (3) NYNEX Boston debits mark up price to NYT Albany by wire; (4) NYNEX Boston mails check to Discon; (5) NYNEX credits excess to MECo; (6) Discon deposits check, wires debit to Boston; (7) Discon bank mails check to NYNEX bank; (8) NYNEX bank mails to MECo	four wire fraud; four mail fraud
7 October 1984	(1) Discon mails invoice no. D84-007 to MECo, which logs actual cost and mark up; (2) MECo wires to NYNEX Boston; (3) NYNEX Boston debits mark up price to NYT Albany by wire; (4) NYNEX Boston mails check to Discon; (5) NYNEX credits excess to MECo; (6) Discon deposits check, wires debit to Boston; (7) Discon bank mails check to NYNEX bank; (8) NYNEX bank mails to MECo	four wire fraud; four mail fraud
19 October 1984	(1) Discon mails invoice no. D84-009 to MECo, which logs actual cost and mark up; (2) MECo wires to NYNEX Boston; (3) NYNEX Boston debits mark up price to NYT Albany by wire; (4) NYNEX Boston mails check to Discon; (5) NYNEX credits excess to MECo; (6) Discon deposits check, wires debit to Boston; (7) Discon bank mails check to NYNEX bank; (8) NYNEX bank mails to MECo	four wire fraud; four mail fraud
2 November 1984	(1) Discon mails invoice no. D84-011 to MECo, which logs actual cost and mark up; (2) MECo wires to NYNEX Boston; (3) NYNEX Boston debits	four wire fraud; four mail fraud

Initial date	Description of mail fraud or wire fraud	No. of acts
	mark up price to NYT Albany by wire; (4) NYNEX Boston mails check to Discon; (5) NYNEX credits excess to MECo; (6) Discon deposits check, wires debit to Boston; (7) Discon bank mails check to NYNEX bank; (8) NYNEX bank mails to MECo	
10 November 1984	(1) Discon mails invoice no. D84-012 to MECo, which logs actual cost and mark up; (2) MECo wires to NYNEX Boston; (3) NYNEX Boston debits mark up price to NYT Albany by wire; (4) NYNEX Boston mails check to Discon; (5) NYNEX credits excess to MECo; (6) Discon deposits check, wires debit to Boston; (7) Discon bank mails check to NYNEX bank; (8) NYNEX bank mails to MECo	four wire fraud; four mail fraud
14 November 1984	O'Reilly tells Faltisco that if Discon bids directly to NYT on Williamsville, MECo will remove Discon vendor certification, directs him to mail letters of withdrawals to Myers and to mail copy to O'Reilly	extortion; two mail fraud
19 November 1984	(1) Discon mails invoice no. D84-013 to MECo, which logs actual cost and mark up; (2) MECo wires to NYNEX Boston; (3) NYNEX Boston debits mark up price to NYT Albany by wire; (4) NYNEX Boston mails check to Discon; (5) NYNEX credits excess to MECo; (6) Discon deposits check, wires debit to Boston; (7) Discon bank mails check to NYNEX bank; (8) NYNEX bank mails to MECo	four wire fraud; four mail fraud
28 November 1984	The day after NYT expanded Discon's role at Franklin Street, AT&T and MECo caused Robert McGee, a former partner of Faltisco, to send a letter to NYNEX Corp. Among the false	two mail fraud

Initial date	Description of mail fraud or wire fraud	No. of acts
	statements were (1) that Discon was not incorporated, (2) that Lepkowski of NYT had favored Discon by guaranteeing a contract between Discon and Rupp Rental, (3) that Discon damaged cables and that NYT personnel repaired them at no cost, (4) that NYT provided training and dismantling assistance to Discon, (5) that Discon had committed "theft" of precious metals during the job. MECo, through agents of NYT Security who knew the allegations to be false, used the letter as an essential part of the scheme to defraud NYT ratepayers by excluding Discon as a supplier. McGee writes NYT Security a similar letter on 24 February 1986.	
15 December 1984	(1) Discon mails invoice D84-015 to MECo, which logs actual cost and mark up; (2) MECo wires to NYNEX Boston; (3) NYNEX Boston debits mark up price to NYT Albany by wire; (4) NYNEX Boston mails check to Discon; (5) NYNEX credits excess to MECo; (6) Discon deposits check, wires debit to Boston; (7) Discon bank mails check to NYNEX bank; (8) NYNEX bank mails to MECo	four wire fraud; four mail fraud
14 January 1985	(1) Discon mails invoice no. D84-016 to MECo, which logs actual cost and mark up; (2) MECo wires to NYNEX Boston; (3) NYNEX Boston debits mark up price to NYT Albany by wire; (4) NYNEX Boston mails check to Discon; (5) NYNEX credits excess to MECo; (6) Discon deposits check, wires debit to Boston; (7) Discon bank mails check to NYNEX bank; (8) NYNEX bank mails to MECo	four wire fraud; four mail fraud

Initial date	Description of mail fraud or wire fraud	No. of acts
11 February 1985	(1) Discon mails invoice no. D84-017 to MECo, which logs actual cost and mark up; (2) MECo wires to NYNEX Boston; (3) NYNEX Boston debits mark up price to NYT Albany by wire; (4) NYNEX Boston mails check to Discon; (5) NYNEX credits excess to MECo; (6) Discon deposits check, wires debit to Boston; (7) Discon bank mails check to NYNEX bank; (8) NYNEX bank mails to MECo	four wire fraud; four mail fraud
4 April 1985	O'Reilly, having received Discon bid of $16,500, directs Rice to mark up amount to $49,000, processed as above	four wire fraud; four mail fraud
27 August 1985	(1) Discon mails invoice no. D84-018 to MECo, which logs actual cost and mark up; (2) MECo wires to NYNEX Boston; (3) NYNEX Boston debits mark up price to NYT Albany by wire; (4) NYNEX Boston mails check to Discon; (5) NYNEX credits excess to MECo; (6) Discon deposits check, wires debit to Boston; (7) Discon bank mails check to NYNEX bank; (8) NYNEX bank mails to MECo	four wire fraud; four mail fraud
8 October 1985	NYT mails Hertel Ave. request for quotation to Discon, awards to Discon on 27 November 1985; on Dec. 10, 1985, NYT mails notice that awarded to another firm; processes AT&T invoices by mail and wire	four wire fraud; seven mail fraud

Defendants control additional information regarding the dates on which the individual acts of racketeering associated with each invoice occurred.

C. Theft of Scrap

74. MECo and O'Reilly defrauded purchasers of scrap belong to NYT. O'Reilly sold scrap from NYT central offices to various dealers, including AMAX Copper ("AMAX"). In late September 1984, O'Reilly instructed Discon by telephone to "salt" scrap at Franklin Street by placing higher grade switches on top. Discon did so, but refused to deny that certain scrap had already been removed. The district manager said that Discon would "pay" for its failure affirmatively to misrepresent the truth to AMAX.

75. On or about November 2, 1984, O'Reilly directed Faltisco by telephone to remove wire spring relays from scrap sold to AMAX. O'Reilly warned Faltisco that he would put Discon "out of business" if it did not comply. MECo and O'Reilly also refused to pay Discon for the removal of these wire springs.

76. On or about January 18, 1985, O'Reilly stole high-value items from NYT scrap at Franklin Street. O'Reilly caused Evergreen Trucking to ship two containers weighing 77,415 pounds to 62 Poplar Drive, Morris Plains, New Jersey and from New Jersey to Taiwan.

77. MECo committed at least five act acts of extortion against Discon, as described in paragraphs 38, 50, 56, 74 and 75. NYT joined in the act of extortion described in paragraph 50. O'Reilly committed the acts of extortion described in paragraphs 38, 74 and 75. NYNEX Corp. and Eckenrode aided and abetted in each of the acts of extortion against Discon by permitting the true circumstances of such acts to be concealed during an investigation by the PSC.

IX. THE CONTROL AND COVER-UP SCHEMES

78. Each defendant understood that if state and federal regulators discovered the scheme to defraud ratepayers described in paragraphs 26 through 73, they would

take action to restrict or eliminate defendants' continued control of NYT. On October 3, 1990, after partial disclosure of the ratepayer frauds, the general counsel to the PSC reported that "ratepayers would be best served by a regulated telephone company that was divested from or became a fully separated subsidiary of NYNEX." Subsequently, the PSC required NYNEX to transfer the functions of MECo to a subsidiary owned by NYT and NET.

A. Abuse of NYT Security

79. Through agents of NYT Security, NYNEX Corp., MECo, and Eckenrode controlled NYT. Until July 1985, Friedman and Eckenrode had authority to hire NYT Security on a "confidential basis" that prevented it from disclosing the purpose or results of the investigation to responsible NYT personnel. After reviewing the investigative report that NYT Security prepared regarding Discon, the PSC staff concluded that NYT Security worked "on behalf of MECo," not NYT. Acting for NYNEX Corp. and MECo, investigators from NYT Security extorted, defamed, and retaliated against employees and vendors who refused to participate in the Eckenrode Synergy Plan or sought to report illegal activities to regulators. Because of NYNEX's abuses, the PSC has conducted an audit of NYT Security that it has not yet publicly released.

80. Michael Williams, who participated with Technologies on removals contracts, caused MECo to award business to his firms by providing gratuities to MECo personnel. MECo and NYT continued to do business with Williams even after he stole materials from a NYT central office. NYT Security failed to take effective action to protect NYT and its ratepayers from the effect of Williams' practices, from the receipt of gratuities by Friedman (*see* paragraph 33(g)), and from the theft of scrap by O'Reilly (*see* paragraph 76).

81. Because Friedman and O'Reilly threatened to reveal to regulators the Eckenrode Synergy Plan and

NYNEX's scheme to defraud ratepayers, Eckenrode, NYNEX Corp., and MECo tolerated acts of racketeering that provided personal benefits to Friedman, O'Reilly, and other MECo personnel at the expense of NYT, as described in paragraphs 33(g), 76, and 80. Eckenrode, NYNEX Corp., and MECo agreed to cause NYT (a) to forego efforts to seek restitution from Friedman and O'Reilly, (b) to avoid adequate corrective actions with to restore to equal status vendors that had been exorted or discriminated against, and (c) to provide false and misleading information to the PSC. As a result of this agreement, Eckenrode, NYNEX Corp., MECo, and NYT aided and abetted in the specified acts of racketeering.

B. Concealments From Regulators and Authorities

82. On March 22, 1985, March 26, 1986, March 27, 1987, March 28, 1988, March 27, 1989, and March 29, 1990, NYNEX Corp. filed its annual report on Form 10-K. Each such report omitted information that was material to purchasers of securities issued by NYNEX Corp. The material omissions included, but were not limited to: (1) the participation of Eckenrode in the design and implementation of the Eckenrode Synergy Plan; (2) the unlawful cross-subsidization by NET and NYT of unregulated affiliates; (3) the impact of markups on the stated value of telephone plant owned by NYNEX subsidiaries; (4) the unorthodox business practices of MECo executives and the involvement of senior NYNEX executives in the subsequent cover-up. The report dated March 29, 1990 materially misstated the exposure of NYNEX Corp. and its subsidiaries to regulatory liabilities by failing to note the commencement of an FCC audit in January 1989. In June 1990, when the *Wall Street Journal* disclosed the involvement of senior NYNEX executives in the cover-up of unorthodox business practices, the price of NYNEX Corp. common stock fell precipitously.

83. NYNEX Corp. caused each report identified in paragraph 82 to be transmitted by wire from New York

City to the offices of the SEC in Washington, D.C. and delivered by mail to various shareholders and other persons. The publication and distribution of these reports by mail and wire were essential parts of the scheme to defraud purchasers of NYNEX securities and NYT ratepayers. Each transmission constitutes a separate predicate act of mail fraud or wire fraud and a separate predicate act of fraud in the sale of securities. Eckenrode, who signed the report dated March 29, 1990, agreed to commit each of the predicate acts associated with the filing, publication and transmission of such reports.

84. On or about March 22, 1985, March 26, 1986, March 27, 1987, March 28, 1988, March 27, 1989, and March 29, 1990, NYT filed its annual report on Form 10-K. Each such report omitted information that was material to purchasers of debt securities issued by NYT. The material omissions included, but were not limited to: (1) the participation of Eckenrode in the design and implementation of the Eckenrode Synergy Plan; (2) the unlawful cross-subsidization by NET and NYT of unregulated affiliates; (3) the impact of markups on the stated value of telephone plant owned by NYNEX subsidiaries; (4) the unorthodox business practices of MECo executives and the involvement of senior NYNEX executives in the subsequent cover-up. The report dated March 29, 1990 materially misstated the exposure of NYT to regulatory liabilities by failing to note the commencement of an FCC audit in January 1989.

85. NYT caused each report identified in paragraph 83 to be transmitted by wire from New York City to the offices of the SEC in Washington, D.C. and delivered by mail to various shareholders and other persons. Each transmission constitutes a separate predicate act of mail fraud or wire fraud and a separate predicate act of fraud in the sale of securities.

86. NYNEX Corp. caused NYT and NET to make materially false statements to the FCC. These included:

(a) False statements in annual reports to the FCC included, but were not limited to, the failure to make financial statements consistent with generally acceptable accounting principals and applicable FCC instructions and regulations.

(b) NYNEX Corp. failed to include accurate information for all of its subsidiaries in the capitalization plan which, at times relevant to this complaint, it was required to file pursuant to 47 C.F.R. Part 68 ("*Computer II*").

(c) According to the audit report of the FCC, NYNEX provided information regarding, among other items, its cash and inventory requirements. As included in the audit report, the information is false. The time, date, and manner in which NYNEX made these misrepresentations in known to defendants. NYNEX also falsely told the FCC staff that MECo provided NYT a "firm contract price" on removals, when in fact it allowed one vendor, Technologies, to bill job changes to NYT. As an essential part of NYNEX's attempted fraud, the FCC mailed the audit report to a party who intervened in its show cause order.

87. NYNEX Corp. caused NYT and NET to make materially false statements to the IRS.

(a) As a result of inflated prices paid for capital equipment and capitalized expenses, the asset bases of NYT and NET is overstated by approximately ten percent. Upon information and belief, NYNEX has misstated the value of its assets on returns to the IRS. This has resulted in claims for excessive depreciation expense and improper tax credits.

(b) NYNEX also claimed as business and capital expenses payments that were illegal under state and federal laws. These payments included, but not limited to, payments to affiliates in violation of sections 90(3), 107, and 110(3) of the New York Public Service Law.

(c) NYNEX Corp. misstated its financial results on state and federal tax returns, deducted illegal payments as

legitimate business expenses, and claimed excessive amounts of depreciation in violation of 29 U.S.C. § 162(c)(2).

C. Extortion of Employees and Vendors

88. NYNEX placed employees who questioned the Eckenrode Synergy Plan and other violations of the consent decree in fear of economic loss. NYNEX fired employees, including Zirkelbach and Tobias Squitieri, who refused to participate in unlawful activities. MECo also retaliated against one of these employees by withholding approximately $21,000 in expense vouchers. As described in paragraph 63, MECo retaliated against an employee who protested its discrimination in favor of AT&T. Each such act of intimidation and retaliation of employees constitutes a separate predicate act of extortion.

89. As described in paragraph 77 and the paragraphs to which it refers, MECo, through O'Reilly and others, committed at least four acts of extortion by placing Discon in fear of economic loss unless Discon participated in unlawful conspiracies. MECo and O'Reilly threatened to drive Discon "out of business" unless Discon concealed its costs from NYT and helped to defraud a scrap dealer.

D. "Hush Money" Payments and Obstructions of Justice

90. From at least as early as January 1989 until June 1992, federal criminal investigators have made inquiries into the activities of NYNEX. Discon and other parties have provided information relating to crimes committed by NYNEX.

91. NYNEX Corp. caused NET to make payments to a discharged employee who had complained that non-economic transactions with affiliates were illegal. According to her attorney, NET entered a settlement with the provision that the discharged employee could not disclose her allegations to the criminal investigators.

92. As alleged in paragraph 63, NYNEX Corp. and MECo caused payments to be made to a former employee against whom it had retaliated after he complained that MECo was discriminating in favor of AT&T on the condition that he would not provide information to public authorities.

93. After Friedman threatened to disclose criminal activity to regulators, NYNEX Corp., MECo and Eckenrode caused NYNEX to make a series of payments to Friedman totaling one million dollars. Although these defendants structured the payments as a settlement of sham litigation alleging religious discrimination, the agreement provided that the payments would cease if Friedman reported crimes to criminal investigators.

94. Because NYNEX Corp., MECo, NYT, and Eckenrode caused each payment identified in paragraphs 91 through 93 to be made with the corrupt intent to induce Friedman not to report evidence of alleged crimes, each payment constitutes a separate predicate act of obstruction of justice. The payments identified in paragraphs 91 and 93 also constitute separate predicate acts of obstruction of a criminal investigation.

95. There are additional anticompetitive acts and acts of racketeering, information regarding which is contained in discovery conducted in proceedings before the PSC, but which is currently subject to orders restricting its use. There are additional anticompetitive acts and acts of racketeering, information regarding which is in the control of PSC officials conducting or supervising the pending audits of NYT Security and of NYT's transactions with affiliates. The PSC has not yet released the results of these audits to the public.

96. There are additional anticompetitive acts and acts of racketeering, information regarding which is in the exclusive control of defendants.

X. CLAIMS FOR RELIEF

COUNT ONE
15 U.S.C. § 2
(Sherman Act, Section 2—attempt to monopolize)

97. Discon realleges paragraphs 1 through 96 as if fully set forth herein. Discon specifically realleges paragraphs 2 and 21 through 58.

98. Under this arrangement, MECo and Technologies have maintained at least 80 percent of the market for removal services in New York State. The arrangement has substantially lessened and eliminated competition in the market for removal services in New York State and contiguous areas ("New York State area" market).

99. Because of the restrictions of the consent decree, the regulatory, technical and economic requirements of NYT for removal services differ from those of interexchange and independent local carriers in and adjacent to its service area (which includes most of New York State and parts of Connecticut). At times relevant to this complaint, MECo and Technologies maintained at least 95 percent of the market for removal services at NYT.

100. NYNEX Corp., NYT and MECo attempted to monopolize the markets for removal services at NYT and in the New York State area. NYT has market power by virtue of its local telephone monopoly. NYNEX Corp. and MECo specifically intended to use this market power to exclude competition from the markets for removal services. There was a dangerous probability that their attempt would succeed, and it did succeed.

101. This attempt to monopolize violated Section 2 of the Sherman Act, 15 U.S.C. § 2.

102. These violations injured Discon in its business and property. As a direct and proximate result of this attempted monopolization, Discon was put out of business, which denied Discon the opportunity to obtain jobs and

to generate profits in an amount not yet ascertained. Discon prays for treble damages, attorneys' fees, and the costs of this suit.

COUNT TWO
15 U.S.C. § 2
(Sherman Act, Section 2—monopolization)

103. Discon realleges paragraphs 1 through 102 as if fully set forth herein. Discon specifically realleges Count One and the paragraphs to which it refers.

104. As a result of actions, taken in concert with AT&T, NYNEX and MECo effectively controlled the price at which contracts for removal services were obtained. NYNEX and MECo acquired and maintained power to restrict or eliminate competition in this markets for removal service at NYT and in the New York State area.

105. The successful monopolization of the market for removal services in the New York State area and of the market for NYT removal services has injured Discon in its business and property. As a direct and proximate result of this successful monopolization, Discon was put out of business, which denied Discon the opportunity to obtain jobs and to generate profits in an amount not yet ascertained. Discon prays for treble damages, attorneys' fees, and the costs of this suit.

COUNT THREE
15 U.S.C. § 2
(Sherman Act, Section 2—conspiracy to monopolize)

106. Discon realleges paragraphs 1 through 105 as if fully set forth herein. Discon specifically realleges Count One and the paragraphs to which it refers.

107. NYNEX Corp., MECo and NYT combined and conspired with others, including Technologies, McGee and LISN, with the specific intent to violate Section 2 of the

Sherman Act by monopolizing the markets for removal services at NYT and in the New York State area. Overt acts in support of this conspiracy include those identified in paragraphs 31, 33 through 39, 41, 46, 47, 49 through 51, 54 through 57.

108. The conspiracy to monopolize the markets for removal services at NYT and in the New York State area has injured Discon in its business and property. As a direct and proximate result of this conspiracy to monopolize, Discon was put out of business, which denied Discon the opportunity to obtain jobs and to generate profits in an amount not yet ascertained. Discon prays for treble damages, attorneys' fees, and the costs of this suit.

COUNT FOUR
15 U.S.C. § 1
(Sherman Act, Section 1)

109. Plaintiff realleges paragraphs 1 through 108 as if fully set forth herein. Discon specifically realleges paragraphs 26 through 63.

110. MECo and Technologies entered into an arrangement to fix prices and to restrict competition in the markets for removal services at NYT and in the New York State area. This arrangement also attempted to fix prices and to restrict competition for other products and services purchased with funds from NYT's regulated accounts, such as transmission and switching equipment. The arrangement included agreements (a) that MECo, through Friedman and NYT, would decertify Discon and make false statements regarding Discon to the PSC, (b) that Technologies would not deal directly with NYT or divulge its prices to NYT, (c) that MECo would award virtually all its contracts from NYT to Technologies as a subcontractor, (d) that MECo would mark up these contracts to prices at or near the predivestiture level, and (e) that MECo and Technologies would divide the resulting mo-

nopoly profits through a system of rebates and reciprocal dealings. As a result of this agreement, NYT paid inflated prices, which NYNEX Corp. caused NYT unlawfully to pass on to monopoly ratepayers.

111. NYNEX Corp. engaged attorneys and accountants to participate in this conspiracy by concealing information from responsible government authorities.

112. NYNEX Corp. and MECo's participation in this combination and in the related conspiracies has violated and continues to violate Section 1 of the Sherman Act, 15 U.S.C. § 1.

113. These restraints of trade injured Discon in its business and property. As a direct and proximate result of this conspiracy and combination to restrain trade, Discon was put out of business, which denied Discon the opportunity to obtain jobs and to generate profits in an amount not yet ascertained. As a further direct and proximate result of the conspiracy to restrain trade, Discon paid increased rates for telephone service in an amount not yet ascertained, but believed to be in excess of $1,800. Discon prays for treble damages, attorneys' fees, and the costs of this suit.

COUNT FIVE
18 U.S.C. § 1962(c)
(RICO conduct enterprise)

114. Discon realleges paragraphs 1 through 113 as if fully set forth herein. Discon specifically realleges paragraphs 64 through 77.

115. NYNEX, which includes NYNEX Corp. and each of its subsidiaries, is an enterprise, as defined in 18 U.S.C. § 1961(4). The enterprise includes attorneys, accountants and other agents whom NYNEX has engaged. It is group of entities and individuals associated in fact who engage in and whose activities affect interstate com-

merce. NYNEX exists separate and apart from the pattern of racketeering.

116. NYNEX Corp., MECo, NYT, Eckenrode, O'Reilly and other persons unlawfully and knowingly conducted and participated in the affairs of NYNEX through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c).

117. NYNEX Corp., MECo, NYT, Eckenrode, O'Reilly and other persons each agreed to commit multiple acts of "racketeering activity," as defined in 18 U.S.C. § 1961(1). These multiple acts constitute a "pattern of racketeering activity," as defined in 18 U.S.C. § 1961(5) because these acts were interrelated and formed part of a common and continuous series of unlawful, fraudulent and injurious schemes perpetrated to achieve the same or similar purposes. These same and similar purposes included (a) the fraudulent inflation of costs recovered by NYT from Discon and other ratepayers under regulation, (b) the subsidization of unregulated NYNEX affiliates through fraudulent transactions and diversions from NYT of funds and assets, including scrap, (c) the corrupt exaction of favors and other things of value from suppliers to the benefit of unregulated affiliates and certain of their employees, (d) the retaliation against employees and vendors who failed to participate in unlawful activities or threatened to disclose them to regulators, and (e) the concealment from regulators and prosecutors of unlawful acts.

118. The multiple acts of racketeering that NYNEX Corp. agreed to commit include those described in paragraphs 69, 73, 83, and 94.

119. The multiple acts of racketeering that MECo agreed to commit include those described in paragraphs 73, 77, 88, 89, and 94.

120. The multiple acts of racketeering that NYT agreed to commit include those described in paragraph 77, 85, 86 and 94.

121. The multiple acts of racketeering that Eckenrode agreed to commit include those described in paragraphs 69, 83, 86, and 94.

122. The multiple acts of racketeering that O'Reilly agreed to commit include those described in paragraphs 38 and 73 through 77.

123. Each of the defendants aided and abetted in acts of racketeering committed by the other defendants.

124. The conduct of NYNEX's affairs through this pattern of racketeering activity injured Discon in its business and property. The fraudulent concealment of Discon's low prices from its customers, prospective customers, and interested regulators deprived Discon of opportunities to expand its business and to increase its market share. The extortion of Discon by O'Reilly and MECo forced Discon to perform work without compensation, even when compensation had been agreed. The fraudulent statements made regarding Discon caused its principal customer to decertify it, forcing Discon out of business. As a direct and proximate result of the pattern of racketeering, including the acts of racketeering that defendants committed, Discon was put out of business, which denied Discon the opportunity to obtain jobs and to generate profits in an amount not yet ascertained. The fraudulent markups required Discon to pay higher regulated telephone rates in an amount not yet ascertained, but believed to be in excess of $1800. Discon prays for treble damages, attorneys' fees, and the costs of this suit.

COUNT SIX
18 U.S.C. § 1962(b)
(RICO controlled enterprise)

125. Discon realleges paragraphs 1 through 124 as if fully set forth herein.

126. NYT is an enterprise, as defined in 18 U.S.C. § 1961(4). NYT is engaged in interstate commerce. Its activities, including the procurement of removal services, affect interstate commerce. NYT exists separate and apart from the pattern of racketeering.

127. NYNEX Corp., MECo, Eckenrode, O'Reilly and other persons known and unknown unlawfully and knowingly maintained control of NYT through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(b).

128. NYNEX Corp., MECo, NYT, Eckenrode, O'Reilly and other persons each agreed to commit multiple acts of "racketeering activity," as defined in 18 U.S.C. § 1961(1). These multiple acts constitute a "pattern of racketeering activity," as defined in 18 U.S.C. § 1961(5) because these acts were interrelated and formed part of a common and continuous series of unlawful, fraudulent and injurious schemes perpetrated to prevent regulators from discovering unlawful acts that would have caused them to restrict defendants' control of NYT.

129. The multiple acts of racketeering that NYNEX Corp. committed include those described in paragraphs 69, 73, 83 and 94.

130. The multiple acts of racketeering that MECo committed include those described in paragraphs 69, 73, 77, 88, 89 and 94.

131. The multiple acts of racketeering that Eckenrode committed include those described in paragraphs 69, 83, 86 and 94.

132. The multiple acts of racketeering that O'Reilly committed include those described in paragraph 38 and 73.

133. Each of these defendants agreed to aid and abet acts of racketeering committed by each of the other defendants for the purpose of controlling NYT.

134. Each of these defendant agreed to commit multiple acts of racketeering.

135. As a direct and proximate result of the control of NYT by NYNEX through the pattern of racketeering activity, Discon suffered injury in its business and property. Defendants' control of NYT further injured Discon by causing Discon to be decertified by its principal customer, effectively putting Discon out of business, which denied Discon the opportunity to obtain jobs and to generate profits in an amount not yet ascertained. Defendants' control of NYT further injured Discon by causing NYT to charge Discon excessive telephone rates. The fraudulent markups required Discon to pay higher regulated telephone rates in an amount not yet ascertained, but believed to be in excess of $1800. Discon prays for treble damages, attorneys' fees, and the costs of this suit.

COUNT SEVEN
18 U.S.C. § 1962(d)
(RICO Conspiracy)

136. Discon realleges paragraphs 1 through 135 as if fully set forth herein. Discon specifically realleges Counts Five and Six and the paragraphs to which they refer.

137. NYNEX, MECo, NYT, Eckenrode, O'Reilly and other persons consciously agreed to join and to enter a conspiracy to violate 18 U.S.C. § 1962(c) by conducting the affairs of NYNEX through a pattern of multiple acts of racketeering. Overt acts of this conspiracy include the acts of racketeering to which paragraphs 118 through 122 refer. Each defendant agreed to commit acts of racketeering as specifically alleged in those paragraphs.

138. NYNEX, MECo, NYT, Eckenrode, O'Reilly and other persons consciously agreed to join and to enter a conspiracy to violate 18 U.S.C. § 1962(b) by controlling NYT through a pattern of multiple acts of racketeering. Overt acts of this conspiracy include the acts of racketeering to which paragraphs 129 through 132 refer. Each defendant agreed to commit acts of racketeering as specifically alleged in those paragraphs.

139. By reason of those agreements to commit acts of racketeering, NYNEX, MECo, NYT, Eckenrode and O'Reilly, with other persons known and unknown, unlawfully, knowingly and willfully conspired to violate the provisions of 18 U.S.C. § 1962(b) and (c), in violation of 18 U.S.C. § 1962(d).

140. Defendants committed other overt acts in furtherance of the conspiracy. These acts included, but were not limited to, (a) the predicate acts of racketeering enumerated in paragraphs 118 through 122 and 129 through 132 and (b) all acts, whether or not otherwise lawful, that furthered the schemes described in paragraph 117.

141. These acts injured Discon in its business and property for the reasons stated in paragraphs 124 and 135. Discon is entitled to damages as set forth in these paragraphs.

COUNT EIGHT
DONNELLY ACT

142. Discon realleges paragraphs 1 to 141 as if fully set forth herein. Discon specifically realleges Courts One through Three and the paragraphs to which they refer.

143. Defendants' conduct actually restrained competition in the market for removal services in New York State.

144. Defendants' activities violated the General Business Law of New York, Article 22, Section 340.

145. These acts injured Discon in its business and property. Discon is entitled to legal and equitable relief for the reasons and to the extent set forth in paragraph 102, 105 and 108.

COUNT NINE
PRIMA FACIE TORT

146. Discon realleges paragraphs 1 to 145 as if fully set forth herein. Discon specifically realleges that the conduct described in paragraphs 26 to 96 maliciously injured Discon.

147. In the alternative to Discon's allegation that defendants retaliated against Discon for the purpose of defrauding NYT ratepayers and concealing such frauds from regulators, Discon alleges that defendants had no motivation other than the desire maliciously to injure Discon.

148. To the extent that these actions did not support the anticompetitive scheme alleged elsewhere in this Complaint, they had no motivation other than the desire maliciously to injure Discon.

149. In the alternative to its claim that defendants' action supported their anticompetitive scheme, plaintiff claims that defendants have committed prima facie tort, in violation of the common law of the state of New York.

150. These acts injured Discon in its business and property. The injuries include the loss of business for Discon to an extent and in an amount not yet ascertained. Defendants are therefore jointly and severally liable to Discon for money damages in an amount unknown at this time, but believed to be in excess of $15 million.

151. Defendants' actions were directed at the public generally because they had the foreseeable effect of injuring ratepayers by depriving them of the benefits of competitive procurement. To deter recurrence of this conduct, Discon prays for an award of punitive damages in the amount of $30 million.

COUNT TEN
THIRD PARTY BENEFICIARY
(MECo Supply Contact)

152. Discon realleges paragraphs 1 through 151 as if fully set forth herein. Discon specifically realleges paragraphs 24 and 73.

153. The MECo Supply Contract requires MECo to maintain reasonable prices and to publish a price list.

154. In entering this contract, NYT specifically intended to benefit independent suppliers and to induce them to supply NYNEX through MECo by assuring them that MECo will not unreasonably mark up their prices. NYT also specifically intended the required disclosure of MECo's prices to allow suppliers to determine where they can effectively compete and reduce prices to NYT and its ratepayers.

155. The MECo Supply Contract is governed by New York law.

156. Because these provisions specifically benefit Discon and other general trade suppliers, they can enforce them as third-party beneficiaries.

157. MECo breached its obligation to maintain reasonable, published prices.

158. This breach injured Discon (1) by permitting the scheme of inflated markups to go undetected by regulators and (2) by depriving Discon of the promised opportunity to compete where it had an economic advantage, causing it to lose contracts in an amount not yet ascertained.

COUNT ELEVEN
BREACH OF CONTRACT
(Discon Supply Contract)

159. Discon realleges paragraphs 1 to 158 as if fully set forth herewith. Discon specifically realleges paragraph 48.

160. MECo breached this written terms of the contract described in paragraph 48 (Exhibit 1) by delaying payments to Discon, by failing to make payments, and by requiring Discon to perform work without compensation.

161. MECo breached the oral terms of this contract by failing to permit Discon to bid on removal contracts that MECo managed.

162. The contract implies a covenant of fair dealing, including implied terms (1) that MECo will not arbitrarily disqualify or retaliate against Discon; (2) that MECo would not rig bids or otherwise discriminate against Discon; and (3) that MECo would not force Discon to perform services outside awarded contracts without compensation.

163. MECo's breach of this contract, which NYNEX Corp. induced, injured Discon in its business and property. Defendants are liable to Discon in an amount not yet ascertained.

COUNT TWELVE
COMMON LAW DEFAMATION

164. Discon realleges paragraphs 1 to 163 as if fully set forth herewith.

165. NYNEX Corp. and MECo caused NYT to make a statement to the PSC in September 1989 that Discon "considered [a loan to an affiliate of Zirkelbach] to be a loan that would not be repaid." NYNEX Corp., MECo, and NYT knew this statement to be false or made the statement with reckless or negligent disregard for the truth. NYNEX Corp., MECo, and NYT caused the PSC to republish this defamation in December 1989 and in or around March 1990.

166. NYNEX Corp. and MECo caused NYT, through its spokesman Tony Pappas, to tell *Newsday* that "Faltisco had loaned Zirkelbach $9,300 interest free, which is why

[MECo] stopped doing business with [Discon]." NYNEX Corp., MECo, and NYT knew this statement to be false or made the statement with reckless or negligent disregard for the truth. *Newsday* republished this defamation on July 29, 1990.

167. NYNEX Corp. attempted to prevent the PSC from disclosing that the defamation had occurred. In May 1990, the PSC determined that its argument lacked any basis in law. Upon information and belief, NYNEX Corp. and MECo may have fraudulently concealed similarly defamatory statements made to prospective customers of Discon.

168. These statements injured Discon's business reputation and its ability to obtain work from prospective customers. It also delayed action by the PSC against MECo's unlawful procurement practices. Defendants are liable to Discon in an amount not yet ascertained.

COUNT THIRTEEN
CIVIL CONSPIRACY

169. Discon realleges paragraphs 1 to 168 as if fully set forth herewith.

170. Defendants agreed with other persons known and unknown ("conspirators") to commit the illegal acts described in Counts One through Twelve.

171. The conspirators committed overt acts in furtherance of this agreement that injured Discon.

172. Defendants are liable for any adverse consequences of such acts.

173. These acts injured Discon in its business and property. Defendants are liable to Discon in an amount not yet ascertained.

WHEREFORE, plaintiff demands trial by jury and prays for an award of threefold the damages suffered by

virtue of the antitrust and racketeering conspiracies, plus additional actual and punitive damages and interest, reasonable attorneys' fees and other costs associated with this suit, in an amount not yet ascertained, but believed to exceed $75 million; and for an Order granting such further relief as the Court deems just and proper.

Dated: July 31, 1992

/s/ George J. Navagh
GOLDSTEIN, NAVAGH
BULAN & CHIARI
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14 Lafayette Square
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716-854-1332

Judgment of the Court of Appeals,
dated August 26, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th day of August, one thousand nine hundred and ninety-six.

PRESENT: HON. JON O. NEWMAN
Chief Judge
HON. JAMES L. OAKES
HON. FRED I. PARKER
Circuit Judges

Docket No: 95-7673

DISCON INCORPORATED,
Plaintiff-Appellant,
v.

NYNEX CORPORATION;
NYNEX MATERIAL ENTERPRISES;
NEW YORK TELEPHONE COMPANY;
ROBERT J. ECKENRODE; and BERNARD O'REILLY,
Defendants-Appellees.

Appeal from United States District Court
for the Western District of New York

JUDGMENT

This cause came on to be heard on the transcript of record from the Western District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, and DECREED that the judgment of said district court be and it hereby is affirmed in part, reversed in part, and remanded to the said district court for further proceedings in accordance with the opinion of this court.

For the Court

GEORGE LANGE III
Clerk

By /s/ Beth J. Meador
BETH J. MEADOR
Administrative Attorney

Order of the Supreme Court of the United States
Granting Writ of Certiorari, dated March 23, 1998

SUPREME COURT OF THE UNITED STATES

No. 96-1570

NYNEX CORPORATION, *et al.*,
Petitioners

v.

DISCON, INCORPORATED

ORDER ALLOWING CERTIORARI

Filed March 23, 1998

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

March 23, 1998